No. 87-2050

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1987

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania, the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania, and CHABAD,

Petitioners,

vs.

AMERICAN CIVIL LIBERTIES UNION GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HOWARD ELBLING, HILARY SPATZ LEVINE, MAX A. LEVINE and MALIK TUNADOR,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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67 pp

Question Presented

Whether the County of Allegheny's display of a privately owned nativity scene inside the Allegheny County Courthouse as part of an annual seasonal celebration of the Christmas holiday violates the Establishment Clause of the First Amendment of the United States Constitution.

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IN THE

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No._____

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania, the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania, and CHABAD,

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AMERICAN CIVIL LIBERTIES UNION GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HOWARD ELBLING, HILARY SPATZ LEVINE, MAX A. LEVINE and MALIK TUNADOR,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The County of Allegheny respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on March 15, 1988. In that

decision, a panel of the Third Circuit on a two-to-one vote reversed the judgment of the United States District Court for the Western District of Pennsylvania and held that the display of a privately owned nativity scene inside the Allegheny County Courthouse as part of an annual seasonal celebration of the Christmas holiday violates the Establishment Clause of the First Amendment of the United States Constitution.

Opinions Below

The memorandum opinion and order of the United States Court for the Western District of Pennsylvania dated May 8, 1987 is not officially reported and appears as Appendix A ("App. A") hereto. The decision of the United States Court of Appeals for the Third Circuit dated March 15, 1988, which reversed the decision of the District Court, is officially reported at 842 F.2d 655 and appears as Appendix B ("App. B") hereto. The order of the United States Court of Appeals for the Third Circuit dated April 19, 1988 which denied the County of Allegheny's petition for rehearing before the Court *in banc* is not officially reported and appears as Appendix C ("App. C") hereto.

Jurisdiction

The judgment of the panel of the Third Circuit Court of Appeals was entered on March 15, 1988. The Order of the Third Circuit denying the Court of Allegheny's petition for rehearing before the Court *in banc* was entered on April 19, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Constitutional Provision Involved

The provision of the United States Constitution involved in this case is the Establishment Clause of the First Amendment as made applicable to the states through the Fourteenth Amendment. The Establishment Clause of the First Amendment states:

> "Congress shall make no law respecting an establishment of religion. . . ."

U.S. Const. Amend. I.

Statement of the Case

Since 1968, Allegheny County has invited various choirs to participate in a Christmas carol program. The performances for the program are scheduled during the weeks preceding the Christmas holiday and are held in two locations: the rotunda of Greater Pittsburgh International Airport and the first floor of the County Courthouse in an architecturally impressive area known variously as the Grand Staircase and the Courthouse Gallery/Forum. Each performance consists of various choirs, typically high school students, singing both popular songs as well as religious and secular Christmas carols. The program is annually dedicated to the universal themes of world peace and brotherhood and to the memory of the missing in action of the Vietnam War. The carol program is publicized by a large banner hung outside the County Courthouse and by press releases. At the Courthouse, the caroling is broadcast by loudspeakers to the public at large.

On the steps of the Grand Staircase where the choirs perform is erected a nativity scene or creche. The creche consists of the traditional figures—a wooden stable with the infant Jesus, the Virgin Mary, Joseph, the Three Wise Men, the Shepherds, various animals and an angel holding a banner reading "Gloria in Excelsis Deo". The figurines range in height from three to fifteen inches. The nativity scene is enclosed by a fence and takes up a small area on the Grand Staircase.

The entire area of the Courthouse where the Christmas carol program is held and the nativity scene is displayed is decorated in traditional Christmas fashion—red and white poinsettia plants, evergreen trees with red bows and Christmas wreaths. These decorations are purchased and arranged by the County's Bureau of Cultural

Programs. Other decorations, including wreaths, trees and Santa Clauses, are displayed by various departments and offices throughout the Courthouse building.

Although a nativity scene has been displayed in conjunction with the choral program since the program's inception, the particular nativity scene displayed on the steps of the County Courthouse at the time in question has only been used as part of the choral program since 1981. This nativity scene is not owned by the County; rather, it is the property of the Holy Name Society of the Diocese of Pittsburgh, a Catholic mens' organization. Ownership of the creche is noted by a sign in front of the nativity scene which reads "This display donated by the Holy Name Society".

Other than providing storage space in the basement of the Courthouse for the past two years and a dolly to transport the display to and from its place of storage, the County has no other involvement with the nativity scene. The County provides no special security, lighting or maintenance for the display. Moreover, the creche is erected, arranged and disassembled each year by the moderator of the Holy Name Society without the assistance of County personnel.

In addition to serving as one of the locales for the annual Christmas carol program, the Grand Staircase—Gallery/Forum Area of the County Courthouse is used throughout the year for art displays and other civic and cultural events and programs.

In November, 1986, the American Civil Liberties Union (ACLU) sent a letter to the County's Board of Commissioners requesting removal of the nativity scene. In a written response to this letter, the County Commissioners disavowed any intent to endorse any

particular religion through the display. The Commissioners wrote that the purpose of the display of the nativity scene, along with other holiday symbols, was simply to express the wish of "Good Will to All Men".

On December 10, 1986, the ACLU and several individuals filed a complaint pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343(3) in the United States Court for the Western District of Pennsylvania seeking to enjoin the County of Allegheny from displaying a nativity scene inside the Courthouse and the City of Pittsburgh from displaying a Chanukah menorah outside the City-County Building. After denying an application for a temporary restraining order, the Honorable Barron P. McCune scheduled a hearing on a motion for a preliminary injunction for December 15, 1986. At the conclusion of the hearing, Judge McCune denied a request for a preliminary injunction.

Subsequent to the hearing on preliminary injunction, Chabad, a Jewish group which owns the menorah and which attempted to intervene in the case during the preliminary injunction hearing, filed a formal motion to intervene. Judge McCune granted Chabad's motion to intervene and a second hearing was held on April 24, 1987 for the limited purpose of permitting Chabad to present evidence concerning the menorah.

By order and opinion dated May 8, 1987, Judge McCune denied the ACLU's motion for a permanent injunction and declaratory relief. App. A.

On May 29, 1987, judgment in the case was formally entered in favor of the County and the City, and an appeal followed.

In a decision dated March 15, 1988, the Third Circuit Court of Appeals reversed the judgment of the District Court. By a vote of two-to-one, the Court of Appeals held that the display of a nativity scene inside the County Courthouse had the effect of endorsing religion and thus violated the second prong of the three part establishment test of *Lemon v. Kurtzman*, 402 U.S. 602 (1971). App. B.

On April 19, 1988, the Circuit Court denied the County's petition for rehearing before the Court *in banc*. Five judges of the Court voted in favor of granting rehearing by the Court *in banc* and the panel's dissenting judge voted in favor of panel rehearing.[1] App. C.

[1] During the interim between the decision of this case and the disposition of the petition for rehearing, Judge Weis, the dissenting judge on the panel, assumed senior status and participated in the decisions as a senior judge. 28 U.S.C. §46(c) (1987).

REASONS FOR GRANTING THE WRIT

I. The decision of the Third Circuit holding the display of a nativity scene inside the Allegheny County Courthouse to be unconstitutional is in conflict with this Court's decision in *Lynch v. Donnelly*.

In determining whether the placement of a nativity scene inside the Allegheny County Courthouse is constitutional, the Third Circuit panel's majority opinion referred to this Court's decision in *Lynch v. Donnelly*, 465 U.S. 668 (1984) as "the starting point" of its analysis. *American Civil Liberties Union v. County of Allegheny*, 842 F.2d 655, 659 (3rd Cir. 1988) (App. B at 15a). But after carefully reviewing *Lynch* and labeling it as "a decision of great significance", *id.* at 660 (App. B. at 18a), the panel majority—without any explanation or comment—simply failed to follow it. By failing to follow *Lynch*, the Third Circuit majority has inexplicably ignored controlling precedent and has decided an important question of constitutional law in conflict with a decision of this Honorable Court.

In *Lynch*, this Court held that the City of Pawtucket's inclusion of a nativity scene in a seasonal holiday display located in a park owned by a non-profit organization did not violate the Establishment Clause. In upholding the constitutionality of the City's display of the nativity scene, this Court in *Lynch* utilized the familiar establishment of religion test articulated in the case of *Lemon v. Kurtzman*, 402 U.S. 602 (1971).

Addressing initially the issue whether the Pawtucket nativity scene had a secular purpose, Chief Justice Burger, writing for the majority, declared that the district court had erred by focusing exclusively on the

religious nature of the creche. The Chief Justice stated that the focus of the *Lemon* inquiry must instead be on the creche in the context of the Christmas season. *Lynch v. Donnelly*, 465 U.S. at 679. Viewed in this perspective, the Court declared that the secular purpose prong of the *Lemon* test was satisfied because the nativity scene display was sponsored by the City to celebrate the Holiday and to depict the historical origins of an event long recognized as a national holiday. *Id.* at 681.

Chief Justice Burger next stated that the nativity scene in *Lynch* did not have a primary effect of advancing religion. In making this determination, the Court stated that inclusion of the nativity scene conferred no greater benefit to religion than those practices found constitutional in other cases. *Id.* at 681. While conceding that the display of a nativity scene would advance religion "in a sense", *id.* at 683, the Court nevertheless found such aid or benefit to be "indirect, remote and incidental." *Id.*

Finally, this Court found that the nativity scene in *Lynch* did not create an excessive entanglement between government and religion. The majority in *Lynch* noted the absence of any excessive administrative entanglements between the government and religion surrounding the erection of the City's nativity scene. The Court added that in the absence of such administrative entanglement, claims of political divisiveness alone were insufficient to invalidate otherwise permissible government conduct. *Id.* at 684.

In deciding *Lynch v. Donnelly*, the unmistakable thrust of this Court was not merely to examine whether one particular holiday display in one city during one Christmas season was constitutional. Rather, this Court utilized *Lynch* to formulate a broad rule of constitutional

law applicable to all such displays. That this Court intended its decision in *Lynch* to have broad application is evidenced in two ways.

First, although the display at issue in *Lynch* was located on private property, the Court dismissed the location of the display as a significant distinction. Chief Justice Burger observed that the Christmas display in *Lynch* was essentially like those displays found throughout the nation—"*often on public grounds.*" *Lynch v. Donnelly*, 465 U.S. at 671 (emphasis added).

Second and more importantly, this Court's decision in *Lynch* contains numerous references to the context of the season as the proper analytical framework for examining the constitutionality of municipal nativity displays. Throughout the majority opinion, Chief Justice Burger consistently referred to "the creche in the context of the Christmas season." 465 U.S. at 679, 680. The former Chief Justice further stated:

> To forbid the use of this one passive symbol—the creche—*at the very time people are taking note of the season* with Christmas hymns and carols in public school and other public places, and while the Congress and Legislatures open sessions with people by paid chaplains would be stilted over-reaction contrary to our history and our holidays.

Id. at 686 (emphasis added).

Although joining in the opinion of the Court in *Lynch*, Justice O'Connor wrote a concurring opinion suggesting a clarification of Establishment Clause doctrine. Justice O'Connor, however, also employed a similar "context of the season" analysis in her opinion. Justice O'Connor declared:

> The evident purpose of including the creche in the larger display was not promotion of the religious context of the creche but celebration of the public holiday through its traditional symbols.

Id. at 691.

Justice O'Connor continued:

> Although the religious and indeed sectarian significance of the creche, as the district court found, is not neutralized by the setting, *the overall holiday setting* changes what viewers may fairly understand to be the purpose of the display—as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that context.

Id. at 692 (emphasis added).

In sum, this Court's decision in *Lynch v. Donnelly* has clearly settled the issue of whether a municipality's display of a nativity scene violates the Establishment Clause. In deciding *Lynch*, this Court fashioned a broad rule applicable to all such seasonal displays regardless of their location or arrangement. The failure of the Third Circuit's panel majority to follow the clear dictates of *Lynch* has resulted in a decision in conflict with the controlling decision of this Honorable Court. Because of this conflict, this petition for a writ of certiorari should be granted.

II. The Third Circuit's decision has increased the existing conflict among the circuit courts of appeal regarding the application of *Lynch v. Donnelly* to nativity displays located in different physical contexts.

Despite the clarity of this Court's holding that a municipal nativity scene erected during the holiday season does not constitute an establishment of religion, there has been considerable litigation over the scope of the *Lynch* decision. Taking their cue perhaps from the dissenting opinion of Justice Brennan in *Lynch v. Donnelly*,[2] several divided courts of appeal have given that decision a very narrow reading. These courts have seized upon such things as former Chief Justice Burger's detailed description of the Pawtucket display[3] and

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[2] Justice Brennan stated:

> [T]he Court reaches an essentially narrow result which turns largely upon the particular holiday context in which the City of Pawtucket's nativity scene appeared. The Court's decision implicitly leaves open questions concerning the constitutionality of the public display on public property of a creche standing alone.

Lynch v. Donnelly, 465 U.S. at 694-95 (Brennan, J. dissenting).

Justice Brennan also noted:

> And given the Court's focus upon the otherwise secular setting of the Pawtucket creche, it remains uncertain whether absent such secular symbols as Santa Claus houses, a talking wishing well, and cut-out clowns and bears, a similar nativity scene would pass muster under the Court's standard.

Id. at 695 n. 1.

[3] Chief Justice Burger noted that the display included, among other things, "a Santa Clause house, reindeer pulling Santa's sleigh, candystriped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant and a teddy bear, hundreds of colored lights, [and] a large banner that read "Seasons Greetings" 465 U.S. at 671. The size, cost and expenses related to the creche were also noted. *Id.*

Justice O'Connor's passing references to the particular arrangement of the creche[4] in order to justify distinguishing *Lynch* on its facts and finding a nativity display in a different physical context violative of the Establishment Clause. The cases which have distinguished *Lynch* have generally been of two types.

The first type, exemplified by the cases of *American Civil Liberties Union v. City of Birmingham*, 791 F.2d 1561 (6th Cir.), *cert. denied* 107 S.Ct. 421 (1986), and *Burelle v. City of Nashua*, 599 F.Supp. 792 (D.N.H. 1984), holds that the constitutionality of a municipal holiday display is dependent upon the content of the display—*i.e.*, its actual physical arrangement. Therefore, "an unadorned creche"—a nativity scene without the secular Christmas figurines present in *Lynch* such as reindeer and Santa Claus—is unconstitutional.

The second, exemplified by the case of *American Jewish Congress v. City of Chicago*, 827 F.2d 120 (7th Cir. 1987), holds that the constitutionality of a municipal holiday display is dependent upon the location of the display. Therefore, a display of a creche on public property as opposed to one in a private park as in *Lynch*, even if accompanied by secular Christmas symbols, is unconstitutional. The court in *Chicago* reasoned that the mere presence of such a religious symbol on public

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[4] Justice O'Connor stated:

> The creche is a traditional symbol of the holiday that is very commonly displayed along with purely secular symbols as it was in Pawtucket. These features combine to make the government's display of the creche in this particular physical setting no more an endorsement of religion than such governmental acknowledgements of religion as legislature prayers. . .

465 U.S. at 692-93.

property automatically creates the implication of government approval and unavoidably fosters an inappropriate identification with religion.

Unlike previous decisions distinguishing *Lynch*, the Third Circuit's panel majority in the instant case relied upon no specific factor in declaring the display inside the Allegheny County Courthouse unconstitutional. Instead, the majority listed six so-called objective "variables" that a court should consider in determining whether the use of a religious symbol in a display on public property or by a public entity has the effect of advancing or endorsing religion. These factors are: (1) the location of the display; (2) whether the display is part of a larger configuration including nonreligious items; (3) the religious intensity of the display; (4) whether the display is shown in connection with a general secular holiday; (5) the degree of public participation in the ownership and maintenance of the display; and (6) the existence of disclaimers of public sponsorship of the display. *American Civil Liberties Union v. County of Allegheny*, 842 F.2d at 662 at 16 (3rd Cir. 1988) (App. B at 22a).

Not all of the circuits, however, have so narrowly limited the *Lynch* decision. In the only unanimous post-*Lynch* appellate decision, the Second Circuit Court of Appeals rejected the notion that the constitutionality of a municipality's display of a nativity scene is dependent upon its location and its arrangement. In *McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984), *aff'd by an equally divided Court sub nom. Board of Trustees of Village of Scarsdale v. McCreary*, 471 U.S. 83 (1985), the Second Circuit labeled as "erroneous" the argument that *Lynch* could be distinguished based upon the particular physical context of a municipality's display of a nativity scene.

The Court in *McCreary* declared: "The Supreme Court did not decide the Pawtucket case based upon the physical context within which display of the creche was situated." *Id.* at 729.

In short, this Court's decision in *Lynch v. Donnelly* has unfortunately not served its purpose of ending the debate over the constitutionality of the display of a nativity scene under municipal auspices. Three circuit courts of appeal have given the *Lynch* decision a very narrow reading and have held that the constitutionality of a municipal nativity display is dependent upon its location and/or arrangement. One circuit court has rejected this narrow reading of *Lynch* and has held that the *Lynch* decision applies to all municipal displays of nativity scenes regardless of their location and arrangement. Because of the on-going conflict among the various circuits over the scope of the *Lynch* decision, this Honorable Court should grant the Petitioner's prayer for a writ of certiorari to finally resolve this conflict.

III. This case involves a question of exceptional public importance.

As this Court observed in *Lynch v. Donnelly*, Christmas displays with nativity scenes are a hallmark of the municipal celebration of Christmas, appearing in literally hundreds of cities and towns across the nation during the holiday season. *Lynch v. Donnelly*, 465 U.S. at 671. In many cities and towns, such Christmas displays are located in or around "City Hall" or the local courthouse because they are the only publicly owned and prominent properties available and suitable for such displays.

By making the constitutionality of a municipal nativity scene display dependent upon its location, several divided circuits have imposed a blanket ban on such displays from city halls and courthouses. In eliminating these locations for these displays, the circuit courts have prohibited many municipalities from having any Christmas holiday display that includes a nativity scene. Thus, for all practical purposes, these circuits have succeeded in a *de facto* reversal of the holding of *Lynch v. Donnelly* for many municipalities.

In view of the far-reaching and significant impact that the resolution of the important constitutional question raised by this case will have on the long-standing and deeply rooted practices of many municipalities for the public celebration of the Christmas holiday, the Petitioner's prayer for the issuance of a writ of certiorari should be granted.

Conclusion

For the foregoing reasons, it is respectfully prayed that the County of Allegheny's petition for a writ of certiorari should be granted.

Respectfully submitted,

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Date: June 9, 1988

APPENDIX A—MEMORANDUM OPINION AND ORDER OF THE UNITED STATES COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

AMERICAN CIVIL LIBERTIES UNION, *et al.*,
Plaintiffs,

vs.

COUNTY OF ALLEGHENY, *et al.*,
Defendants.

Civil Action 86-2617

MEMORANDUM OPINION

BARRON P. McCUNE, District Judge
May 8, 1987.

The following is written to comply with Rule 52.

On December 10, 1986, the plaintiffs filed a complaint pursuant to 42 U.S.C. §1983 seeking a temporary restraining order and a preliminary injunction prohibiting the defendant county from displaying a creche in the Allegheny County Courthouse during the holiday season and the defendant city from displaying a menorah in front of the City-County Building in Pittsburgh. The creche was already in place. The menorah was customarily erected during the celebration

of Chanukah and it was assumed that it would be placed in front of the City-County Building, as usual, beside a Christmas tree, because the Mayor of the City had written to the presiding officer of the ACLU that he intended to permit the display. The buildings are in proximity to one another on Grant Street.

A temporary restraining order was not granted but a prompt hearing was afforded on the motion for a preliminary injunction. A declaratory judgment was also requested declaring that the expenditure of public funds for the storage of the displays and their erection, as well as the displays themselves, violated the First and Fourteenth Amendments.

A hearing was held on December 15, 1986, at the conclusion of which the court dictated findings from the bench. Those findings are incorporated by reference. I would add to those findings only that the county did not purchase the creche. It was donated by a religious society and a clergyman erects the creche. It is stored in the basement of the courthouse when not in use. Very little, if any, public funds are used for this purpose.

During the hearing Chabad moved to intervene to introduce its view of the significance of the display of the menorah. The objection of the plaintiff to that motion was sustained. Chabad later renewed the motion and we granted the motion for the purpose of hearing limited testimony preparatory to determining whether a permanent injunction should be granted or denied. Meanwhile the city filed a motion to dismiss which will be denied. A hearing was held on April 24, 1987, and these findings are added to those references above.

Chabad-Lubavitch is an organization or faction within the jewish religion which follows orthodox dogma. It requested the city some five years ago to permit a

menorah to be displayed at the time of Chanukah in front of the City-County Building. Chabad furnished the menorah and the city permits the display and has the menorah erected and taken down by city employees. It is much smaller than the Christmas tree usually erected. It is stored in the City-County Building. In front of the tree and the menorah there is displayed a sign which proclaims the blessings of liberty as shown on a photograph which is part of the record.

The Chanukah menorah has no particular religious significance when placed in a public location beyond signifying a "Light to the World" somewhat like the Christmas message "Peace on Earth, Goodwill to Men."

Chabad advocates the display of Chanukah menorahs in public and private places during the holiday season all over the country to symbolize the lighting of the souls of the jewish people, i.e., to call on them to go forth and accomplish good and overcome evil.

The intervenors therefore wish the city's practice continued. They consider the message which the display brings to the public to be one of good will. The lighting of the menorahs also permits jewish families to participate in all of the holiday lighting which occurs and to show their children that they also have a reason to decorate with lights (see letter of Marlaini Darfler to the Ithaca Journal as part of Exhibit 18).

The expense to the city is minimal and of no consequence.

I fail to see how the display of the menorah violates the establishment clause. It may call to the attention of the public that jews also have a miracle to remember. Certainly the local governments should not be enjoined from allowing both faiths to call attention to the miracles

which enrich their histories, either the virgin birth or the burning of one day's oil for many days while the jews sought to recapture their temple[1], so long as the symbols are part of a holiday season display. I should think the joint displays a message that in Pittsburgh the faiths harmonize and both seek to send some light to the world at the holiday seasons. I cannot conceive that a court should forbid such a thing or declare it illegal.

The first amendment merely states that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.

The plaintiffs rely on two cases which were decided subsequent to *Lynch v. Donnelly*, 465 U.S. 668 (1984). One case, *ACLU v. City of Birmingham*, 791 F.2d 1561 (6th Cir. 1986), *cert. denied* 107 S. Ct. 421 (1986) involved an isolated display of a creche on the lawn of a city hall and the other, *ACLU v. City of St. Charles*, 794 F.2d 265 (7th Cir. 1986), *cert. denied* 107 S. Ct. 458 (1986) concerned the isolated display of a cross on a municipal fire station. Both can be distinguished and are unpersuasive. *Lynch* teaches that the focus of the inquiry must be on the symbol in the context of the holiday season. In this context neither the county or the city should be enjoined. In the case of the county, the creche was but part of the holiday decoration of the stairwell and a foreground for the highschool choirs which entertained each day at noon. In the case of the city, if there was any religious significance to the menorah it was but an insignificant part of another holiday display.

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[1] Chanukah celebrates the recapture of the temple in Jerusalem from the Syrian Greeks is 165 B.C.E. The miracle, we understand, to be the continuous light emanating for several days from but one day's supply of oil.

There is no evidence whatsoever that the defendants were motivated by religion. Were one to apply the three pronged test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) the plaintiffs have failed to show enough to justify our intervention because we find that the displays had a secular purpose, their purpose was not to advance or prohibit religion and they did not create an excessive entanglement of government with religion. Nor is there evidence that the displays have caused political division.

We will deny the motion for a permanent injunction as well.

An order follows.

BARRON P. McCUNE
Barron P. McCune
Senior United States District Judge

cc: *Counsel of record.*

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

AMERICAN CIVIL LIBERTIES UNION, *et al.*,
Plaintiffs,

vs.

COUNTY OF ALLEGHENY, *et al.*,
Defendants.

Civil Action 86-2617

ORDER

AND NOW, May 8, 1987, the motion of the city to dismiss is denied. However the motions for a permanent injunction and for declaratory relief are denied.

BARRON P. McCUNE
Barron P. McCune
Senior United States District Judge

cc: James B. Lieber, Esq.
Roslyn M. Litman, Esq.
Jon Pushinsky, Esq.
Benjamin Wechsler, II, Esq.
A. Asher Winikoff, Esq.
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APPENDIX B—DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 87-3395 & 87-3436

AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HOWARD ELBLING, HILARY SPATZ LEVINE, MAX A. LEVINE and MALIK TUNADOR

v.

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania and the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania

CHABAD,
Intervenor

AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HOWARD ELBLING, HILARY SPATZ LEVINE, MAX A. LEVINE,
Appellants No. 87-3395

MALIK TUNADOR,
Appellant No. 87-3436

On Appeal from the United States District Court for the Western District of Pennsylvania
D.C. Civil No. 86-2617

Argued January 20, 1988

BEFORE: GIBBONS, *Chief Judge*,
and WEIS and GREENBERG,
Circuit Judges

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OPINION OF THE COURT

GREENBERG, *Circuit Judge*.

This action was commenced on December 10, 1986 by plaintiffs American Civil Liberties Union, Greater Pittsburgh Chapter, and certain individuals against Allegheny County and the City of Pittsburgh, political subdivisions of the Commonwealth of Pennsylvania. In general, plaintiffs alleged that the county had unlawfully permitted the erection of a creche or nativity scene depicting the birth of Jesus Christ inside the main entrance of the Allegheny County Courthouse and the city was about unlawfully to permit the erection of a menorah, a nine-branched candelabrum used by Jews as part of the religious celebration of Chanukah, on the steps of the main entrance of the City-County Building jointly owned and operated by defendants. It was asserted that the expenditure of public funds and the display of the religious symbols violated the Establishment Clause of the First Amendment of the United States Constitution applicable to the states under the Fourteenth Amendment, thus giving rise to a cause of action under 42 U.S.C. § 1983. Plaintiffs sought declaratory and injunctive relief as well as nominal damages and attorneys' fees.

Following an evidentiary hearing on December 15, 1986, the court in an oral opinion made findings and denied a preliminary injunction. Thereafter Chabad, the Jewish organization which owns the menorah, was permitted to intervene and present additional evidence. On May 8, 1987 the district judge issued a memorandum opinion incorporating his prior oral findings and adding findings regarding the menorah. On that day the court entered a final judgment denying all requested relief and this appeal followed.

The facts in this case are simple and essentially undisputed. Annually since 1981 the county has permitted the display of a creche enclosed by a fence on the grand staircase of the first floor of the county courthouse. The creche consists of traditional figures ranging in height from three to 15 inches, including a wooden stable with the infant Jesus, the Virgin Mary, Joseph, the Three Wise Men, shepherds, various animals and an angel holding a banner reading "Gloria in Excelsis Deo" ("Glory to God in the Highest"). The creche, though stored in the basement of the courthouse, is the property of the Holy Name Society of the Diocese of Pittsburgh, a Catholic men's organization and thus a sign in front of it recites: "This display donated by the Holy Name Society." Though it is erected, arranged and disassembled each year by the moderator of the Holy Name Society, the county supplies a dolly and minimal aid to transport it to and from the courthouse basement. While the county provides no special security or illumination for the display, its Bureau of Cultural Programs decorates the creche with red and white poinsettia plants and evergreen trees purchased at public expense. The county also displays wreaths purchased through county funds. Other decorations such as trees, Santa Clauses and additional wreaths are displayed by

various departments and offices throughout the courthouse building.

The creche is displayed for about six weeks from late November to early January. During the weeks prior to Christmas the county sponsors Christmas carol programs on the first floor of the courthouse with the chorale groups using the creche for a foreground. The choirs, typically high school students, sing popular songs and religious and secular Christmas carols. The caroling is broadcast by loudspeakers to the public in the courthouse. The programs are dedicated to the universal themes of world peace and brotherhood and to the memory of persons missing in action in the Vietnam War. The grand staircase and the surrounding area are used throughout the year for art displays and other civic and cultural events and programs.

The courthouse houses the principal offices of the county, including those of its governing officers, the county commissioners, and the treasurer and controller, as well as the criminal and some civil courts of Allegheny County. In view of the creche's location, it is probably seen by many visitors to the courthouse including taxpayers, lawyers trying cases or serving as arbitrators, litigants, persons desiring to search certain court records and people with business at the sheriff's office.

The City-County Building, the site of the menorah, is one block from the courthouse. The various public offices in the building include those of the city treasurer, county prothonotary, marriage license bureau and the register of wills. In addition, certain courts sit in the building. Although the building bears the name of both political subdivisions, the menorah is placed in an area maintained solely by the city. For a number of years during the Christmas season the city has installed a 45 foot Christmas tree on a platform on

the front steps of the main entrance of the building and next to the tree on the steps of the main entrance to the building since 1982 the city has annually erected an approximately 18 foot high menorah. The menorah, which was purchased by Chabad, is put in place at the time of the Jewish celebration of Chanukah. In front of the tree a sign bearing the mayor's name has been erected. It recites:

SALUTE TO LIBERTY

> During this holiday season, the City of Pittsburgh salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom.

The display, which includes the tree and its ornaments, the platform, the sign and the menorah, is installed by city employees. In addition, the City has placed signs advertising a charity fund drive and a seasonal celebration of a flower display in front of the building.

In the district judge's oral opinion, he indicated that the case was controlled by the Supreme Court's decision in *Lynch v. Donnelly*, 465 U.S. 668, 104 S.Ct. 1355 (1984). He found that neither the display of the creche nor of the menorah conveyed a message of governmental enforcement of religion. He noted:

> . . . none of the people who enter the Courthouse are required to do anything; they are not required to read, or to sing, or to pause or to reflect. Neither are people required to pause or look or read or make any gestures where the menorah is concerned; they are merely displays.

While he did not doubt the sincerity of witnesses who testified that the creche offended some visitors to the courthouse, he pointed out that "the Governments of

the United States. Local and State and Federal do many things that are offensive to many people, and . . . mere offense is not sufficient to impel the Court to issue an injunction." He continued: "There must be more substantial injury than mere offense that is felt inwardly. But it is not felt because one must read, or sing, or talk, or pause, or do something affirmatively." The judge concluded:

> The mere displays, therefore, are found to be de minimis in the context of the First Amendment. I don't think there's any danger whatever that they will establish any religion. I don't think the County Commissioners or the Mayor and the City intend to affect anyone's religion, or even offend anyone. On the contrary, I think the intention was to celebrate the holiday season, and I doubt that the County or City officials paused to think that they were offending anyone. So, therefore, I just do not see very much chance of the plaintiffs succeeding on the merits. I don't think that there has really been any appreciable harm. I don't think that the mere reference to religion is actionable.

In his subsequent memorandum opinion the judge wrote:

> The Chanukah menorah has no particular religious significance when placed in a public location beyond signifying a 'Light to the World' somewhat like the Christmas message 'Peace on Earth, Goodwill to Men.'
>
> Chabad advocates the display of Chanukah menorahs in public and private places during the holiday season all over the country to symbolize the lighting of the souls of the Jewish people, i.e., to call on them to go forth and accomplish good and overcome evil.
>
> . . . .

> The expense to the city [in the erecting and storing the menorah] is minimal and of no consequence.
>
> I fail to see how the display of the menorah violates the establishment clause. It may call to the attention of the public that Jews also have a miracle to remember. Certainly the local governments should not be enjoined from allowing both faiths to call attention to the miracles which enrich their histories, either the virgin birth or the burning of one day's oil for many days while the Jews sought to recapture their temple, so long as the symbols are part of a holiday season display. I should think the joint displays [send] a message that in Pittsburgh the faiths harmonize and both seek to send some light to the world at the holiday seasons. I cannot conceive that court should forbid such a thing or declare it illegal.

In a footnote to his opinion he explained that:

> Chanukah celebrates the recapture of the temple in Jerusalem from the Syrian Greeks in 165 B.C.E. The miracle, we understand, to be the continous light emanating for several days from but one day's supply of oil.

We are in agreement with the trial judge that the starting point of our analysis should be *Lynch v. Donnelly*. There residents of Pawtucket, Rhode Island, and the Rhode Island affiliate of the American Civil Liberties Union brought an action challenging the city's inclusion of a creche in its annual Christmas display erected in cooperation with the downtown retail merchants' association in a park owned by a non-profit organization located in the heart of the shopping district. In addition to the creche, the display included many of the figures and decorations traditionally associated with Christmas, such as a

Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant and a teddy bear, hundreds of colored lights and a large banner that read "Seasons Greetings." The creche, which had been included in the display for 40 or more years, consisted of the traditional figures, all ranging in height from five inches to five feet. When acquired, it cost the city $1,365 and at the time of the suit was valued at $200. The erection and dismantling of the creche cost the city about $20 per year and, though there were nominal expenses for its lighting, no money had been spent for its maintenance for the ten years preceding the suit. The district court held that the city's inclusion of the creche in the display violated the Establishment Clause and the Court of Appeals for the First Circuit affirmed. *Donnelly v. Lynch*, 525 F. Supp. 1150 (D. R.I. 1981), *aff'd*, 691 F.2d 1029 (1st Cir. 1982).

A sharply divided Supreme Court reversed. For the majority, Chief Justice Burger pointed out that in a First Amendment Establishment Clause case, the Court must reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either the church or state upon the other, but that total separation of the two is not possible and is not required. *Lynch v. Donnelly*, 465 U.S. at 672-73, 104 S.Ct. at 1358-59. He then demonstrated that religion has long entered into governmental functions and thus the Supreme Court has uniformly rejected an absolutist approach in applying the Establishment Clause and instead has "scrutinized challenged legislation or official conduct to determine whether, in reality, it establishes a religion or religious faith or tends to do so." 465 U.S. at 678, 104 S.Ct. at 1361-62.

Chief Justice Burger indicated that: "In each case, the inquiry calls for line-drawing; no fixed, *per se* rule

can be framed." 465 U.S. at 678, 104 S.Ct. at 1362. He observed that while the Court has often in Establishment Clause cases used the three-prong *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111 (1971), test of whether the conduct questioned has a secular purpose, whether its principal or primary effect is to advance or inhibit religion and whether it creates an excessive entanglement of government with religion, it has "repeatedly emphasized [its] unwillingness to be confined to any single test or criterion in this sensitive area." 465 U.S. at 679, 104 S.Ct. at 1362. Thus he stated that in two cases subsequent to *Lemon*, *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330 (1983), and *Larson v. Valente*, 456 U.S. 228, 102 S.Ct. 1673 (1982), the Court had not applied the *Lemon* test. Chief Justice Burger then indicated that the focus of the Court's inquiry should be on the creche in the context of the Christmas season. He wrote that there was a secular purpose for the display and the evidence did not establish the inclusion of the creche in the display was a purposeful or surreptitious effort to express some subtle advocacy of a particular religious message. 465 U.S. at 680, 104 S.Ct. at 1363.

The Chief Justice rejected the district court's finding that the primary effect of including the creche was to confer a substantial and impermissible benefit on religion in general and on the Christian faith in particular as he considered that the benefits conferred were "indirect, remote, and incidental" when compared to other governmental action upheld by the Court. 465 U.S. at 681-82, 104 S.Ct. at 1363-64. He noted that while it could be argued that the display of the creche showed an alignment of the government with Christianity, the benefit to religion was "no more an advancement of religion than the Congressional and Executive recognition of the origins of the Holiday

itself as 'Christ's Mass,' or the exhibition of literally hundreds of religious paintings in governmentally supported museums." 465 U.S. at 683, 104 S.Ct. at 1364. Finally, the Court found that the third prong of the *Lemon* test, whether the conduct creates an excessive entanglement of government with religion, had not been violated as there had been no appreciable administrative entanglement between religion and state resulting from the city's ownership and use of the creche.

Though a decision of great significance, *Lynch v. Donnelly* has by no means put to rest issues involving use of religious decorations at the Christmas season nor has it foreshadowed any abandonment of the *Lemon* test which the Supreme Court continues to employ. *See Edwards v. Aguillard*, ___ U.S. ___, ___, 107 S.Ct. 2573, 2576-78 (1987); *Wallace v. Jaffree*, 472 U.S. 38, 55-61, 105 S.Ct. 2479, 2489-90 (1985). Indeed, probably because the opinion was tied so closely to the facts involved and because of the nature of the issues, there has been considerable post-*Lynch* litigation with the judges as well as the litigants at odds. Of these post-*Lynch* cases, we find two decisions by divided courts particularly helpful. *American Jewish Congress v. City of Chicago*, 827 F.2d 120 (7th Cir. 1987), and *American Civil Liberties Union v. City of Birmingham*, 791 F.2d 1561 (6th Cir.), *cert. denied*, ___ U.S. ___, 107 S.Ct. 421 (1986).

In *American Jewish Congress v. City of Chicago*, the Court of Appeals for the Seventh Circuit dealt with a privately constructed and owned creche displayed in the lobby of the Chicago City-County Building during the holiday season. While the creche had been donated to the city, after earlier litigation it was reconveyed to the donor. 827 F.2d at 123. The creche was displayed at a prominent part of the building but the display

included signs disclaiming any endorsement by the city. *Ibid.* A nominal amount of public funds was expended to illuminate the scene and the city maintained other Christmas decorations within the building including wreaths, a Christmas tree, a mechanical Santa Claus with reindeer and a snowman. 827 F.2d at 122.

The Court of Appeals held that the *Chicago* creche was a self-contained unit set apart from secular objects and thus differed from that in *Lynch v. Donnelly*. 827 F.2d at 125. Even more significant, however, was the circumstance that unlike that in *Lynch v. Donnelly* the creche in *Chicago* was placed at the official headquarters of the government and not in a private park. 827 F.2d at 126. The court concluded that the creche was "an unequivocal Christian symbol," 827 F.2d at 127, so that its placement in this "unique physical context" communicated a message of government endorsement which violated the second prong of the *Lemon* test. 827 F.2d at 128. It explained:

> The presence of a government in Chicago's City Hall is unavoidable. The building is devoted to government functions: for example, both city and county government offices are located there, and the City Council holds its meetings there. Because City Hall is so plainly under government ownership and control, every display and activity in the building is implicitly marked with the stamp of government approval. The presence of a nativity scene in the lobby, therefore, inevitably creates a clear and strong impression that the local government tacitly endorse Christianity.
>
> The message of endorsement is equally powerful on the symbolic level. Like the nativity scene itself, City Hall is a symbol -- a symbol of government power. The very phrase 'City Hall' is

commonly used as a metaphor for government. *A creche in City Hall thus brings together Church and State in a manner that unmistakably suggests their alliance.* The display at issue in this case advanced religion by sending a message to the people of Chicago that the city approved of Christianity.

The city has attempted to mitigate the impact of this message by posting six disclaimer signs on the display, two on each side, and two on the front. However, the message of government endorsement generated by this display was too pervasive to be mitigated by the presence of disclaimers. As the district court correctly noted, 'a disclaimer of the obvious is of no significant effect.' *American Jewish Congress v. Chicago*, No. 85 C 9471 at 14 (N.D. Ill. Nov. 5, 1986).

'"Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any -- or all -- religious denominations as when it attempts to inculcate specific religious doctrines. If this identification conveys a message of government endorsement . . . a core purpose of the Establishment Clause is violated."' *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 389, 105 S.Ct. 3216, 3226, 87 L.Ed.2d 267 (1985). The government-approved placement of the nativity scene in Chicago's City Hall unavoidably fostered the inappropriate identification of the City of Chicago with Christianity, and therefore violated the Establishment Clause. [827 F.2d at 128 (footnotes omitted, emphasis added).]

In *American Civil Liberties Union v. City of Birmingham* the Court of Appeals for the Sixth Circuit addressed the constitutionality of a city-owned creche

built, stored and maintained at public expense and placed on the front lawn of the city hall. The court held that the placement of the creche violated the Establishment Clause as it conveyed the message that the city endorsed Christianity. It noted that the display called attention solely to the religious origin of the Christmas holiday season as it was not a portion of a larger display including a "multitude of secular symbols." 791 F.2d at 1566.

A different approach than that in the *Chicago* and *Birmingham* cases was taken by another court in *McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984), *aff'd without opinion by an equally divided Court*, 471 U.S. 83, 105 S.Ct. 1859 (1985). There the municipality refused a group's request to be permitted to place a privately-owned creche in a municipal park in the center of the business district. The Court of Appeals for the Second Circuit considered the case from the viewpoint of protecting the applicant's First Amendment rights and thus was concerned with whether the exclusion was necessary to serve a compelling public interest. 739 F.2d at 723. The court held that it was not as the placement of the display would not violate the *Lemon* test. However, the matter was remanded so that an order could be entered requiring a more prominent sign disclaiming a public interest in the display.

In other cases the courts have addressed the constitutionality of the Christian cross and have recognized that the cross is a symbol of Christianity and that it is thus not only religious but also a symbol of a particular religious sect. Consequently, these courts have concluded that because a cross is more than simply a symbol of Christmas, *i.e.*, because it possesses this independent religious significance, its placement on public buildings is an endorsement of religion. *See, e.g., American Civil Liberties Union v.*

City of St. Charles, 794 F.2d 265 (7th Cir.), *cert. denied*, ___ U.S. ___, 107 S.Ct. 458 (1986); *Libin v. Town of Greenwich*, 625 F. Supp. 393 (D Conn. 1985). While there seems to be little reported litigation involving menorahs, in *Lubavitch of Iowa, Inc. v. Walters*, 808 F.2d 656 (8th Cir. 1986), it appears that the Court of Appeals affirmed the district court's denial of a preliminary injunction sought by the plaintiffs to compel a state official to allow a menorah to be placed on public grounds where a Christmas tree was displayed.

From our consideration of the foregoing cases and others, we have concluded that the second prong of the *Lemon* test is that most readily violated as a public entity usually is able to articulate some secular purpose for a display (first prong) and the mere placement and storage of a display will involve little entanglement (third prong) of government and religion. *See American Civil Liberties Union v. City of Birmingham*, 791 F.2d at 1565-66. On the other hand the use of a religious symbol in a display on public property or by a public entity may well be deemed an endorsement of religion regardless of an entity's stated reasons for its placement and thereby implicate the second *Lemon* prong as the impact of the display must be judged objectively. The variables that a court should consider in determining whether a display has the effect of advancing or endorsing religion include: (1) the location of the display; (2) whether the display is part of a larger configuration including nonreligious items; (3) the religious intensity of the display; (4) whether the display is shown in connection with a general secular holiday; (5) the degree of public participation in the ownership and maintenance of the display; and (6) the existence of disclaimers of public sponsorship of the display.

Application of the foregoing principles here leads

inexorably to the conclusion that the district judge's determination that the second prong of the *Lemon* test was not violated was incorrect and cannot stand with respect to both the creche and the menorah whether we consider his findings to be matters of law or fact. *See United States v. Adams*, 759 F.2d 1099, 1106 (3d Cir. 1985), *cert. denied*, ___ U.S. ___, ___, 106 S.Ct. 275, 336 (1985); *Lame v. United States Dep't of Justice*, 767 F.2d 66, 69-70 (3d Cir. 1984). Each display was located at or in a public building devoted to core functions of government and each was placed at a prominent site at the public building where visitors would see it. Further, while the menorah was placed near a Christmas tree, neither the creche nor the menorah can reasonably be deemed to have been subsumed by a larger display of non-religious items. In addition, both the creche and the menorah are associated with religious holidays and would be viewed as pertaining to a particular religion. Further, the menorah, unlike the creche, is not associated with a holiday with secular aspects. There is public participation, albeit minimal, in both the storage and placement of the displays. Overall, when the record is evaluated in light of these considerations, the only reasonable conclusion is that by permitting the creche and the menorah to be placed at the buildings the city and county have tacitly endorsed Christianity and Judaism and have therefore acted to advance religion.[1] While we do not doubt that some persons find this laudable, it is impermissible under the second prong of the *Lemon* test and thus violates the Establishment Clause of the First Amendment.

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1. Of course, we do not imply that if only a creche or only a menorah had been involved our result would have been different. Quite to the contrary we would have reached the same result if only one of the displays had been placed by defendants or either of them.

We recognize, of course, that there is a sign near the creche indicating that the display is a donation of the Holy Name Society. That factor, however, cannot possibly outweigh the considerations which lead us to find that placement of the creche violated the second prong of the *Lemon* test.

In reaching our result, we have not overlooked the argument by Chabad in its brief that a menorah has "no inherent religious significance," unlike certain other objects such as a Torah scroll which contains the five books of Moses. While this distinction is not totally without significance, Chabad admits that the menorah is associated with Chanukah, a religious holiday. Further, we cannot believe that the general public would be aware of the religious fine point made by Chabad and thus view the display of the menorah as a lesser endorsement of religion than that of a Torah scroll or other object regarded as sacred. In any event regardless of the lack of religious significance of a menorah its sectarian character is clear and thus even though it may not be regarded as a sacred object its placement was an endorsement of religion.

Further, we have not ignored the finding by the district judge that the city and county have permitted the faiths to call attention to the miracles enriching their histories. This is undoubtedly so but is exactly what the governments involved here had no lawful right to do. It is clear that in reality the judge was concluding that the governments had endorsed and advanced religion in a fashion barred by *Lemon* and not authorized by *Lynch v. Donnelly*. It is not the function of government to assist religions in explaining their ideologies.

In stating our result, we emphasize that we are not here dealing with purely secular objects. Nor are we concerned with the use of religious objects in a museum or as educational instruments in a classroom.

in which circumstances the objects could be presented neutrally. Thus, it could not reasonably be believed that the school authorities were endorsing a religion if they included a display of a creche or a menorah as a demonstration of religious objects in a history course. Similarly, a display of religious paintings in a public museum merely reflects an appreciation of the artistic value of the objects. Here, however, the effect was different as it is evident that the religious displays of the city and county have the effect of endorsing the messages reflected by the displays. This is unconstitutional.

In view of our result we need not consider whether either the first or third prong of the *Lemon* test has been violated. The judgment of May 8, 1988 will be reversed and this matter will be remanded to the district court for further proceedings consistent with this opinion.

WEIS, *Dissenting*.

It is unfortunate that plaintiffs have succeeded in stifling governmental commemoration of two miracles which occurred about one hundred-fifty years apart in time, but so few miles in distance -- and muffling the message of peace and understanding that pervades the joint observance. This aggressive "neutrality" is contrary to the spirit of religious liberty embodied in the First Amendment and will lead not to accommodation but to animosity, not to tolerance of, but hostility toward, religion.

I.

The jurisprudence of the Establishment Clause, by far the more litigated of the two religion guarantees of

the First Amendment, ranks high in confusion, inconsistency, and emotional fervor. It has provoked an enduring and highly spirited debate. At one extreme of the controversy are those who advocate an absolutist separation between religion and state, a quarantining of one from the other that verges on governmental enmity toward religion. At the other end of the debate are those who find no constitutional impropriety in governmental activity that aids all creeds equally and without discrimination.

The Supreme Court's teachings in this area have become mired between these two competing positions, each view at different times and on different issues commanding a narrow majority in the Court and emerging as the law of the land, often just temporarily. As a result, the Court's Establishment Clause decisions map out only a wavering, uncertain course of what is permissible governmental activity. Illustrative cases demonstrate the breadth of the controversy and the inconsistent results.

Absolutists would condemn all forms of government financial aid to religion. *See Zorach v. Clauson*, 343 U.S. 306, 318 (1952) (Black, J., dissenting) ("In considering whether a state has entered this forbidden field the question is not whether it has entered too far but whether it has entered at all.") However, the Court has found no constitutional violation in the longstanding government practices of providing tax exemptions to religious institutions, *Walz v. Tax Comm'n*, 397 U.S. 664 (1970); federal grants for constructing college buildings at church-sponsored universities, *Tilton v. Richardson*, 403 U.S. 672 (1971); and vocational assistance to finance a blind person's training at a Christian college to become a pastor, missionary, or youth director, *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986), although each of these programs

conferred a measurable financial benefit on religion.

Similarly, the Court has ruled that a state legislature did not violate the Establishment Clause by engaging a chaplain to open each legislative session with a prayer, *Marsh v. Chambers*, 463 U.S. 783 (1983); or by enacting a statute prohibiting all commercial activity on Sunday, *McGowan v. Maryland*, 366 U.S. 420 (1961). Nevertheless, a statute directing the posting of a privately-purchased copy of the Ten Commandments in school classrooms was held contrary to the Establishment Clause. *Stone v. Graham*, 449 U.S. 39 (1980).

Invoked often in cases questioning a state's financial support to parochial schools, the Establishment Clause has yielded contradictory and frequently irrational results. The Court has held that a school district may pay for students' bus transportation to parochial schools, where religion undoubtedly will be taught. *Everson v. Board of Educ.*, 330 U.S. 1 (1947). But government may not finance bus trips for parochial students to a natural history museum, where religious instruction is highly unlikely. *Wolman v. Walter*, 433 U.S. 229 (1977). A state may lend parochial schools textbooks that contain maps of the United States, *Board of Educ. v. Allen*, 392 U.S. 236 (1968), but it may not lend those same schools unbound maps of the United States for use in geography classes. *Meek v. Pittenger*, 421 U.S. 349 (1975).

A state may provide supplementary remedial courses in math and reading to parochial school students. *Wolman*, 433 U.S. at 245. However, remedial courses taught by visiting public school teachers may not be conducted in parochial school classrooms leased by the state, cleared of religious artifacts, and bearing disclaimer signs. *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985). Numerous similar examples only

make the same point. *See* Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. Pitt. L. Rev. 673, 680 (1980). One must reluctantly agree with the Supreme Court's own assessment of its success in this area, that after forty-one years of trying it still "can only dimly perceive the lines of demarcation." *Witters*, 474 U.S. at 485.

Commentary by legal scholars parallels the Court's deep ideological divisions. The sheer volume of publications on the subject has reached such proportions that its magnitude alone discourages judicial reference. *See, e.g.*, Fairchild, *Lynch v. Donnelly: The Case For the Creche*, 29 St. Louis U.L.J. 459 (1985); Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall -- A Comment on Lynch v. Donnelly*, 1984 Duke L.J. 770, 772 n.5 (sampling commentary). *See also Religion and the State*, 27 Wm. & Mary L. Rev. 833, 833-1109 (1986) (symposium).

Particularly misleading has been the Court's recurring characterization of the Establishment Clause's objective as erecting a "wall of separation." This metaphor, originally invoked by the Court over a century ago in *Reynolds v. United States*, 98 U.S. 145, 164 (1879), is ascribed to Thomas Jefferson. In a short note to the Danbury Baptist Association in 1802, he wrote: "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and State." *Thomas Jefferson: Writings* 510 (M. Peterson ed. 1984). Jefferson considered the Religion Clauses applicable to the national, but not state, government.

Justice Black later treated this reference as an expression of the Framers' intent, embracing the

metaphor as a guiding principle for Religion Clause analysis. In his view, our national religious freedom was conditioned on keeping this "wall" separating church from state "high and impregnable." *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 212 (1948); *Everson*, 330 U.S. at 18.

As an interpretation of the Framers' intent, the metaphor is quite inaccurate. The author, Thomas Jefferson, was not in the country when the Clause was debated and ratified, nor does his note to the Danbury Baptist Association -- written eleven years after the Establishment Clause was added to the Constitution -- shed much light on the original drafters' intentions.[1] Though the phrase might have reflected James Madison's views as articulated at the time of his 1785 *Memorial and Remonstrance Against Religious*

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1. It appears that Jefferson himself did not perceive his "wall" to be so high as to preclude state acknowledgment of religion. Judge Easterbrook cites Jefferson's preamble to his 1779 Virginia Bill for Establishing Religious Freedom: "Well aware . . . that Almighty God hath created the mind free, and manifested his Supreme will that free it shall remain. . . . That all attempts to influence it by temporal punishments . . . are a departure from the plan of the holy author of our religion, who being Lord both of body and mind . . .." American Jewish Congress v. City of Chicago, 827 F.2d 120, 135-36 (7th Cir. 1987) (Easterbrook, J., dissenting). *See also* Crabb, *Religious Symbols, American Traditions and the Constitution*, 1984 B.Y.U. L. Rev. 509, 516 & n.31 (Jefferson's Declaration of Independence contains four references to Deity, including: "We hold these truths to be self-evident, that all men . . . are endowed by their Creator with certain inalienable Rights . . .").

As President, Jefferson had signed a treaty with the Kaskasia Indians providing for annual federal funding for a Catholic priest for the tribe and placing 12,000 acres of land in trust "for propagating the Gospel among the Heathen." Wallace v. Jaffree, 472 U.S. 38, 103 n.5 (1985) (Rehnquist, J., dissenting).

Assessments,[2] it does not comport with his expressed understanding of the Clause's meaning at the time of its formulation.[3]

More telling is the actual conduct of the First Congress, the body that considered and adopted the Establishment Clause. *See Wallace*, 472 U.S. at 100-03 (Rehnquist, J., dissenting). The First Congress reenacted the Northwest Ordinance of 1787 (providing that "[r]eligion, . . . being necessary to good government and the happiness of mankind, . . . shall forever be encouraged"), *see id.* at 100; and implored President Washington to declare a national day of thanksgiving and prayer so that all Americans might join voices "in returning to Almighty God their sincere thanks for the many blessings he had poured down

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2. Madison's *Memorial and Remonstrance* was appended to Justice Rutledge's dissent in Everson v. Board of Educ., 330 U.S. 1, 63-72 (1947).

3. Recorded in the Annals of Congress is Madison's understanding of what the new amendment meant:

> "He [Madison] believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform. He thought if the word 'national' was introduced [before the word religion], it would point the amendment directly to the object it was intended to prevent."

1 Annals of Cong. 731. This view, that the Establishment Clause was intended only to exclude rivalry among Christian sects, was echoed by Justice Story. *See* 2 J. Story, *Commentaries on the Constitution of the United States* 631-32 (M. Bigelow 5th ed. 1891).

As Judge Easterbrook notes, Madison may in fact have approved of a balancing test approach to the Establishment Clause. While president, Madison had proclaimed national days of fasting and thanksgiving. Though he later "recanted" this "separationist heresy," Madison pleaded *de minimis non curat lex*. *City of Chicago*, 827 F.2d at 132 n.2 (Easterbrook, J., dissenting).

upon them." *see id.* at 101. The same week that it approved the Establishment Clause for submission to the states, the First Congress authorized the hiring of legislative chaplains. *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984).

Thus, the historical evidence is clear that the Framers did not intend the Establishment Clause to erect between religion and state a "wall of separation." In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Supreme Court conceded that its "wall" reference had been an unwise choice of metaphors. "Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Id.* at 614.

Yet, the use of this inaccurate metaphor persists along with its unfortunate semantic overtone implying a preference for state antagonism to, rather than accommodation of, religion in the United States. As I explained in *Public Funds for Public Schools of New Jersey v. Byrne*, 590 F.2d 514, 522 (3d Cir.) (Weis, J., concurring), *aff'd sub nom.*, 442 U.S. 907 (1979), I find the encouragement of such a relationship between religion and state undesirable and inconsistent with the Constitution.

Recognizing the lack of a common principle in its Establishment Clause cases, the Supreme Court has attempted to offer some guidance in this sensitive are The Court most frequently has applied the three-facto formula set out in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *Lemon* recognized the impossibility of total separation between church and state. "Some relationship between government and religious organizations is inevitable." *Id.* at 614. To assess whether that relationship in a specific case has crossed the line of permissibility, the Court examines whether the challenged law or conduct has a secular purpose,

whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement with religion. *Id.* at 612.

The *Lemon* approach often has been criticized as inadequate, but has been employed by the Court on most occasions -- perhaps only because a better analysis has yet to command a majority. *Cf. Edwards v. Aguillard*, ___ U.S. ___, ___, 107 S. Ct. 2573, 2607 (1987) (Scalia, J., dissenting) (advocating abandonment of *Lemon*'s purpose prong); *Wallace*, 472 U.S. at 91 (White, J., dissenting) (supporting basic reconsideration of Establishment Clause precedents); *Lynch*, 465 U.S. at 688-89 (O'Connor, J., concurring) (suggesting an institutional entanglement/endorsement two-part test to replace *Lemon*).

Nevertheless, the Court repeatedly has refused to accept the three-part *Lemon* analysis as the single, dispositive "test" for evaluating a state's conduct under the Establishment Clause. *See, e.g., Witters*, 474 U.S. at 485 (Court merely "guided" by *Lemon*); *Ball*, 473 U.S. at 382-83 (*Lemon* serves to guide "the general nature of our inquiry"); *Lynch*, 465 U.S. at 679 (*Lemon* useful but not always relevant); *Mueller v. Allen*, 463 U.S. 388, 394 (1983) (*Lemon* provides "no more than a helpful signpost"). On occasion, the Court has refused even to invoke that formula, particularly when the result would be to overturn long-established traditions. *See Lynch*, 465 U.S. at 679. Such a departure from *Lemon* is illustrated by *Marsh v. Chambers*, where the Court refused to ban either prayer sessions opening the legislative day or payment to the legislature's chaplain.

With this brief survey of an exceptionally complicated subject matter behind us, we come now to the case which, to my mind, is the controlling precedent and binds this court.

II.

The majority agrees that *Lynch v. Donnelly*, 465 U.S. 668 (1984), should be the starting point of our analysis. I believe that *Lynch* also ends our analysis. That case directly addresses and conclusively resolves the dispute we encounter here. Because the district court properly applied the holding in *Lynch*, I would affirm its judgment.

The concern in *Lynch* was a creche displayed under municipal auspices and encouragement, as is the case here. In describing the town of Pawtucket's creche display, the Chief Justice wrote that the scene was "essentially like those to be found in hundreds of towns or cities across the Nation -- often on public grounds -- during the Christmas season." *Lynch*, 465 U.S. at 671. The creche was purchased by the town government, and assembled, disassembled, and stored by town workers. In the annual lighting ceremony, the mayor threw the switch to illuminate the creche.

In its opinion, the Supreme Court discussed at some length the competing constitutional arguments implicated by this display. It is helpful to distill key elements.

The Court first reaffirmed its holdings that complete separation between religion and state is not required, but that the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Id.* at 673. Thus, official pronouncements by Presidents and Congress declaring Christmas a national holiday have done so permissibly "in religious terms." *Id.* at 676.

The Court renounced the absolutist approach that would mechanically invalidate all state actions that confer a benefit on or afford special recognition to a particular religion or to religion in general. Instead, the Court explained that the challenged governmental

conduct must be examined "to determine whether, in reality, it establishes a religion or religious faith, or tends to do so." *Id.* at 678.

The Court assumed that the Christmas creche "advances religion in a sense," *id.* at 683, and conceded that it possessed "religious significance," *id.* at 687. The opinion made clear, however, that mere advancement of religion is not the test for assessing constitutionality under the Establishment Clause. "[O]ur precedents plainly contemplate that on occasion some advancement of religion will result from governmental action." *Id.* at 683.

Although the creche "of course" is widely identified with one particular faith, in the Court's assessment this identification is no greater than that found in other cases upheld against Establishment Clause challenges. *Id.* at 685. "[N]ot every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon [religion] is, for that reason alone, constitutionally invalid." *Id.* at 683.

The Court concluded: "To forbid the use of this one passive symbol -- the creche -- at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, and while the Congress and legislatures open sessions with prayers by paid chaplains, would be a stilted overreaction contrary to our history and to our holdings. • • • Any notion that these symbols pose a real danger of establishment of a state church is farfetched indeed." *Id.* at 686.

Justice O'Connor joined in the majority opinion, but wrote separately to suggest a reformulation of the Establishment Clause analysis that would hinge on a state's "endorsement" of religion. *Id.* at 687 ("I concur in the opinion of the Court. I write separately to suggest a clarification of our Establishment Clause doctrine."). Justice O'Connor expressed some concern

that a government's endorsement of religion might send "a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Id.* at 688 (O'Connor, J., concurring). She concluded that the resolution of this analysis in *Lynch* was "in large part a legal question to be answered on the basis of judicial interpretation of social facts." *Id.* at 694 (O'Connor, J., concurring).

Also conceding the "religious and indeed sectarian significance of the creche," Justice O'Connor found that "the overall holiday setting . . . negates any message of endorsement of that content. The display celebrates a public holiday, and no one contends that declaration of that holiday is understood to be an endorsement of religion." *Id.* at 692 (O'Connor, J., concurring).

It should be emphasized that Justice O'Connor joined not only in the judgment of the Court but in the opinion of the other four Justices as well.[4] Her concurrence, therefore, must be read as agreement with the lead opinion written by the Chief Justice and suggesting, but not requiring, an alternate rationale for reaching the same result. Justice O'Connor, as well as that of the *Lynch* majority, concluded that although the creche contains a religious element, it nevertheless passes Establishment Clause scrutiny.

Despite the clarity of the Supreme Court's holding that a municipal creche display erected during the holiday season does not constitute an impermissible endorsement of religion, two courts of appeals, over strong dissents, have ruled otherwise. These courts have pointed to irrelevant and inconsequential

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4. *Cf.* United States v. Mechanik, 475 U.S. 66, 73 (1986) (O'Connor, J., concurring) (concurring in result, but rejecting majority's reasoning).

variations in the location of the creche display and its positioning among other Christmas symbols as factors to justify disregarding the clear spirit of *Lynch*.

In *American Jewish Congress v. City of Chicago*, 827 F.2d 120 (7th Cir. 1987), the Court of Appeals for the Seventh Circuit decided that a creche scene in the lobby of the Chicago City Hall violated the Establishment Clause. The court reasoned that the location inside a government building intensified the state's "alliance" with religion, and distinguished that display from the one in *Lynch* erected in a private park. On that basis, the panel majority thought itself free to declare the display unconstitutional.

In *American Civil Liberties Union v. City of Birmingham*, 791 F.2d 1561 (6th Cir.), *cert. denied*, 107 S. Ct. 421 (1986), the Court of Appeals for the Sixth Circuit found fault with Birmingham's "unadorned" creche -- one unaccompanied by secular holiday decorations. The court concluded that without nonreligious trappings to temper its impact, a Christmas creche conveys an unconstitutional sectarian message.

In both instances, the majority opinions reflect less an attempt to apply the Supreme Court's holding in *Lynch* than a disapproving rejection of its message. But the judicial hierarchical system in this country mandates faithful adherence by lower federal courts to a holding of the United States Supreme Court, "no matter how misguided the judges of those courts may think it to be." *Hutto v. Davis*, 454 U.S. 370, 375 (1982).

The powerful dissenting opinions in both cases demonstrate the errors of those majorities, critiques to which little need be added here. Some aspects merit emphasis, however. The *City of Chicago*'s governmental location distinction ignores the Supreme Court's observation in *Lynch* that the

Pawtucket creche was essentially similar to those displays found nationwide -- "often on public grounds." *Lynch*, 465 U.S. at 671. Municipal participation was no secret, and the Supreme Court treated the display as governmental action.

Moreover, the court of appeals' preoccupation with the Christmas display location in City Hall is especially perplexing in light of the Supreme Court's decision in *Marsh v. Chambers*. In that case, the challenged prayer service was conducted in the legislative chamber itself -- not a public area of the capitol building. If the Supreme Court did not consider that practice a prohibited endorsement of the sectarian beliefs espoused by the legislatively-paid chaplain, it is difficult to understand why a creche displayed in a government building during the Christmas season cannot pass constitutional muster. Indeed, the fact that Christmas has been declared a national holiday by the state (and that action is not considered a forbidden endorsement) weighs heavily against the *City of Chicago* rationale.

Equally unpersuasive is the *City of Birmingham*'s adorned/unadorned distinction. *Lynch* simply does not support applying such a "Two Plastic Reindeer" rule.[5] As Justice O'Connor noted, the secular

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5. *See* Note, *Of Crosses and Creches: The Establishment Clause and Publicly Sponsored Displays of Religious Symbols*, 35 Am. U.L. Rev. 477, 495 (1986). Judge Nelson has described this distinction with the similarly fitting label, the "St. Nicholas, too" test. *City of Birmingham*, 791 F.2d at 1569 (Nelson, J., dissenting) ("a city can get by with displaying a creche if it throws in a sleigh full of toys and a Santa Claus, too").

Actually, the Santa Claus legend is derived from folklore surrounding the life of St. Nicholas, a Catholic bishop of the fourth century. In the Dutch and German customs, St. Nicholas delivers gifts to children on December 6. The secularization process in the United States combined the St. Nicholas tradition with the birth of Christ, and both became celebrated on December 25. *See* J. Barnett, *The American Christmas* 4, 24-48 (1954); E. Count, *4000 Years of Christmas* 57-63 (1948).

decorations surrounding the Pawtucket creche did not nullify its sectarian religious significance. Rather, the December holiday setting was the element that altered "what viewers may fairly understand to be the purpose of the display – as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content." *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring).

This "unadorned" distinction, even if valid, is irrelevant here. The Pittsburgh creche was surrounded by traditional Christmas symbols, including wreaths, evergreen trees, and poinsettia plants, and served as a thematic backdrop for the County's traditional holiday choral program. The appellants' contention that these obviously secular symbols are not secular enough calls to mind Judge Nelson's admonition: "I question whether it is appropriate for the federal courts to tell the towns and villages of America how much paganism they need to put in their Christmas decorations." *City of Birmingham*, 791 F.2d at 1569 (Nelson, J., dissenting).

All of the courts of appeals have not disregarded *Lynch*. In the only unanimous post-*Lynch* appellate decision, the Court of Appeals for the Second Circuit rejected both the governmental location and the adorned/unadorned distinctions. *McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984), *aff'd by an equally divided Court*, 471 U.S. 83 (1985). There, the court found that a disclaimer sign attached to a creche served as an acceptable device to assure spectators that the municipality did not endorse religion. Though *Lynch* would not require such a sign, the court in *City of Chicago* refused to accept even that modification as a means of reducing the appearance of governmental endorsement.

The *City of Chicago* and *City of Birmingham* cases

are suprising for their reexamination of the creche under *Lemon*, independent of the Supreme Court's application of that analysis in *Lynch*. Yet the Court in *Lynch* already had evaluated the creche display against the *Lemon* criteria and found it constitutional. First, the Court decided that the display had the secular purpose of depicting the historical origins of the Christmas holiday. *Lynch*, 465 U.S. at 680. Second, the Court concluded that the creche's primary effect constituted no greater an endorsement of religion than that found acceptable in prior Establishment Clause cases. *Id.* at 682. Third, the Court determined that Pawtucket's administrative entanglement in administering and maintaining the creche was de minimis. *Id.* at 684. But the Court did not end its discussion there. Rather, it proceeded to emphasize that the creche was a "passive" symbol, the banning of which would constitute "a stilted overreaction." *Id.* at 685-86.

The tone of *Lynch* is unmistakable. I have found no indication that the Pawtucket display survived constitutional scrutiny because it was situated in a private park rather than a county courthouse, or because it closely resembled a miniature golf course with candy-striped poles, talking wishing wells, and cut-out elephants. The civil government's recognition of the origins of Christmas during the holiday season simply was not perceived by the Supreme Court as a threat to the aims of the Establishment Clause. The Court all but dismissed the appellant's claim as much ado about nothing and, reading the opinion, one can imagine the Court steadfastly resisting the temptation of chiding, "Bah humbug!"

III.

The facts of the case at hand do not differ significantly from those in *Lynch*. The placement of

the creche in the gallery of the Allegheny County Courthouse, accompanied by poinsettia plants and evergreens, does not violate the Establishment Clause simply because plastic Santa Clauses or reindeer are absent. Neither does placing the creche in the Courthouse during the Christmas season emit any more coercive effect than the paintings displayed in the Courthouse gallery.

Appellants have not challenged the high schools' choral singing programs that take place in the same location at the Courthouse, indeed using the creche as a scenic backdrop. Unlike the creche, the singing is not passive, but rather vocalizes unquestionably religious themes. Yet those carols also are part of this nation's cultural heritage. Should they too be censored from utterance in the Courthouse? What of a municipality's holiday banner bearing Tiny Tim's timeless petition, "God bless us, everyone"? Must the name of the holiday be changed to "Winter Solstice Day" so that there can be no government "endorsement" of a "religious overtone"?

Distilled to its essence, *Lynch* advocated an approach of moderation, understanding, and a sense of proportion in ruling on displays commemorating the Christmas season. I think the decision in this case strays from that course.

IV.

What, then, of the menorah? The majority relies on cases that emphasizes the total grouping of the holiday symbols. It may help, therefore, to describe the spatial circumstances here. A narrow street separates the City-County Building in Pittsburgh from the Courthouse; a tunnel runs underneath connecting the two. County offices and courts are located in the Courthouse.

The City-County Building also houses Allegheny

County government offices, including the Register of Wills and the Prothonotary of the Common Pleas Court. In addition, the City-County Building also contains county courtrooms and the City of Pittsburgh offices. Rather than separate and unrelated structures, these two buildings are more accurately treated as a unified government complex. Viewed from the average citizen's perspective, the creche and the Christmas tree in the Courthouse together with the menorah affixed to the front of the City-County Building constitute but one large display commemorating the holiday season.

I assume, as the Court did in *Lynch*, that the challenged symbol has religious significance. I assume further that the menorah, in this context, is associated with Chanukah, a religious holiday celebrated by persons of the Jewish faith.[6] Chanukah often occurs in late December. As the district judge explained, in displaying both Jewish and Christian holiday symbols, the local governments allowed those faiths to call attention to the miracles enriching their histories, thereby demonstrating the harmony of their ideals of "bringing light to the world."

Viewing these displays as a whole, I find that the "message" conveys no more government endorsement

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6. Chanukah -- meaning the Days or the Feast of Dedication -- is celebrated for eight days beginning on the twenty-fifth of Kislev in the Jewish calendar. It is basically a home festival, centering on the kindling of candles each evening at dusk. The festival commemorates the recapture in 165 B.C.E. of the Holy Temple in Jerusalem from the Syrian Greeks. In preparing to rededicate the temple, the Maccabees could locate only a one-day's supply of the sacred oil used to light the temple menorah. Nevertheless, the oil burned in the menorah for eight continuous days until new oil could be prepared. The next year, Chanukah was set for perpetual celebration of the Jewish nation's victory over religious persecution. *See* H. Gaster, *Festivals of the Jewish Year* 234-53 (1978); M. Ickis, *The Book of Festival Holidays* 88-89 (1964).

of religion than if the creche alone were exhibited.[7] Including a reference to Chanukah did no more than broaden the commemoration of the holiday season and stress the notion of sharing in its joy. By marking the Judeo-Christian aspects of the holiday season, the local governments appropriately called attention to the great pluralism that is the hallmark of religious tolerance in this country.

I find no breach of the Establishment Clause here.

V.

Despite many opportunities to do so, the Supreme Court has never held that state practices which afford special recognition to religious groups are, for that reason alone, constitutionally infirm. Instead, the Court has expressly rejected such a view as "contrary to the teaching of our cases that there is ample room for accommodation of religion under the Establishment Clause." *Corporation of Presiding Bishop v. Amos*, ___ U.S. ___, ___, 107 S. Ct. 2862, 2869 (1987).

By publicly acknowledging the holidays of the various religions, "[w]e make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary." *Zorach*, 343 U.S. at 313. In displaying the symbols of religious holidays during their celebration, "[w]e sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma." *Id.* Instead of contravening the Establishment Clause, such displays constitute

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7. Unlike the posting of the Ten Commandments invalidated in Stone v. Graham, 449 U.S. 39 (1980), the menorah is not a permanent fixture on the Pittsburgh City-County Building; it is erected and dismantled in conjunction with the celebration of Chanukah.

"simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh*, 463 U.S. at 792.

These displays pose no threat to religious freedom, yet their suppression forebodes ominous consequences. I dissent.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX C—ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 87-3395 & 87-3436

AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HOWARD ELBLING, HILARY SPATZ LEVINE, MAX A. LEVINE and MALIK TUNADOR

v.

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania and the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania

CHABAD,
Intervenor,

AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HOWARD ELBLING, HILARY SPATZ LEVINE, MAX A. LEVINE,
Appellants No. 87-3395,

MALIK TUNADOR,
Appellants No. 87-3436.

D.C. Civ. No. 86-2617

SUR PETITION FOR REHEARING

BEFORE: GIBBONS, *Chief Judge*, *SEITZ*, *HIGGINBOTHAM*, *SLOVITER*, *BECKER*, *STAPLETON*, *MANSMANN*, *GREENBERG*, *HUTCHINSON*, *SCIRICA*, *COWEN*, *and WEIS*, *Circuit Judges*.

The petitions for rehearing filed by appellees County of Allegheny, City of Pittsburgh and Chabad in the above-entitled cases having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petitions for rehearing by the panel and the Court in banc, are denied. When the cases were decided Judge Weis was an active judge but he has now assumed senior status and has participated in the decision on the petitions as a senior judge. Judges Higginbotham, Stapleton, Mansmann, Hutchinson, and Scirica would grant rehearing by the court in banc. Judge Weis would grant panel rehearing.

BY THE COURT,

MARK J. GREENBERG
Circuit Judge

Dated: APR 19 1988

Supreme Court, U.S.
FILED
AUG 11 1988
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 87-2050, 88-90, 88-96

In the Supreme Court of the United States

October Term, 1988

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania and the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania, *Petitioners*,

and

CHABAD, *Petitioner*,

vs.

AMERICAN CIVIL LIBERTIES UNION GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HOWARD ELBLING, HILARY SPATZ LEVINE, MAX A. LEVINE and MALIK TUNADOR, *Respondents*,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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August 12, 1988

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BRIEF FOR RESPONDENTS* IN OPPOSITION

Respondents submit this brief to demonstrate that the Petition for Writ of Certiorari should be denied.

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*Respondents include American Civil Liberties Union, Greater Pittsburgh Chapter, Ellen Doyle, Michael Antol, Reverend Wendy L. Colby, Howard Elbling, Hilary Spatz Levine and Max A. Levine.

COUNTER-STATEMENT OF THE CASE

The facts of the case are accurately summarized in the Circuit Court's opinion. Respondents make the following additions to clarify and/or correct some of the statements expressly or impliedly made in the three petitions for certiorari.

The government displays here enjoined were religious symbols, not part of, or subsumed by, any larger secular display. *American Civil Liberties Union v. County of Allegheny*, 842 F.2d 655, 662 (3d Cir. 1988). They were placed at or in public buildings devoted to core functions of government. *Id.*

The Allegheny County Courthouse is the seat of county government, housing not only the County's executive officers, its controller, treasurer and sheriff, among others, but in addition some of its criminal and civil courts. *Id.* at 657. Among the Courthouse visitors, therefore, are those who are present under compulsion of law. (*See* App. 157a).[1]

The County stores, moves, and decorates the nativity scene each year. 842 F.2d at 657. The nativity scene, containing the traditional figures (varying in height from 3 to 15 inches), *id.*, derived from the gospels of Luke and Matthew, is approximately 5 by 3 feet (9 feet including its surrounding fence) and stands alone, occupying one-half or more of the grand staircase. (App. 101a, 124a, 171a, 205a, 228a). The creche is a traditional religious display, adhering to Christian religious teachings. (App. 171a). The traditional Mary, Joseph, the infant Jesus and figures kneeling in adoration are topped by an angel bearing a banner with words from the gospel of Luke "Gloria in Excelsis Deo"

[1] "App." refers to the Joint Appendix filed in the Court of Appeals.

(Glory to God in the Highest) (*Luke 2:14*). (App. 104a-107a, 393-394a). 842 F.2d at 657. A Catholic priest testified without contradiction that the creche is indistinguishable from those commonly displayed in Catholic churches. (App. 104a, 130a). No evidence was ever submitted, or argument suggested, that the Courthouse area in any way constituted a public forum.

The City-County Building is the principal headquarters for City of Pittsburgh government, housing its mayor and its legislative body (city council) as well as numerous government offices, the principal civil trial courts, and Pennsylvania appellate courts (Commonwealth, Superior and Supreme). (App. 131a, 147a); 842 F.2d at 657. Here also among the visitors are those who come under compulsion of law (jurors and subpoenaed witnesses).

Contrary to the City petitioner's implication that the Menorah was one of a number of items included in a larger display, the City's Christmas season display consisted solely of the Christmas tree and its ornaments, the platform (on which the tree stood), the sign "Salute to Liberty" below the tree and to one side, the Menorah. *Id.* Signs advertising a fund drive and a flower display were in front of the building but, as examination of the photograph (Pet., Chabad, 4) reveals, these were not part of some large display which included the Christmas tree and Menorah. *Id.* at 657-658. While the Menorah was placed near the Christmas tree, it was in no way "subsumed by a larger display of non-religous items." *Id.* at 662. Even the district court's denial of an injunction acknowledged that Chabad, an orthodox faction of the Jewish religion, advocates the display of Chanukah Menorahs (lighted by Jews during the eight nights of the Jewish Chanukah festival) during the

holiday "to symbolize the lighting of the souls of the Jewish people." *Id.* at 658. The district court indeed recited that the Menorah may call attention to the public that the Jews "also have a miracle to remember." *Id.*

The placement of the Christmas tree was not questioned by any of the parties and no proof was offered nor argument made as to its being a Christian symbol. No finding was made with respect to the Christmas tree since petitioner Chabad's "neutrality" argument was never raised prior to appeal.

Although the rabbinical experts for the plaintiff and the intervenor each put a different focus upon the Menorah, the record unquestionably supports the circuit court's finding that the Menorah's sectarian character is clear. *Id.* at 662. Without attempting to resolve the distinction between plaintiff's expert's testimony that the Menorah is a religious symbol and the argument offered by Chabad's expert that the Menorah need not be treated in the same manner as other religious "objects", the circuit panel relied upon the appropriate "effects" test in rejecting the district court's suggestion that governments may assist certain religions by helping them to call attention to the miracles enriching their histories. *Id.* at 663.

With respect to the Menorah, as petitioner City of Pittsburgh acknowledges, "the display was solely that of the City" (Pet., City, 4). As with the Courthouse, no suggestion was ever raised or evidence submitted that the steps of this government building would in any way constitute a public forum.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The Petition for Writ of Certiorari should be denied since there is no novel or certworthy question raised on this record nor any unanswered legal question to be resolved by the Court; there is neither conflict among the circuits nor is there conflict with any opinion of this Court. Furthermore, the necessary facts to support the arguments now being improperly raised are not part of the record below.

I. There are no "special and important reasons" to justify review by this Court.

Resolution of the present case did not involve any unsettled questions of federal constitutional law. The decision required no more of the court than to apply this Court's controlling precedents and applicable constitutional doctrine to the facts before it; this it did. Contrary to the petitioners' suggestions that the Court of Appeals opinion is in conflict with or misapplies this Court's holding in *Lynch v. Donnelly,* 465 U.S. 668 (1984), the opinion faithfully considered and applied both *Lynch* and *Lemon v. Kurtzman,* 403 U.S. 602 (1971), the controlling precedents.

In *Lynch,* this Court delineated the limited circumstances in which the official display of a nativity scene by a governmental body in a privately owned park would be consistent with the commands of the Establishment Clause. That case held that the *inclusion* of a nativity scene in an extensive Christmas holiday season display, otherwise consisting entirely of the secular symbols of Christmas, did not violate the Establishment Clause in that setting. This was because the inclusion of the nativity scene in the display was related to the *secular* purpose of the display

itself, the City's official celebration of the national holiday, and so did not impermissibly involve the City in the endorsement of religion. In that context the nativity scene was deemed to have lost most of its religious significance and did no more than depict the historical origin of what has become a primarily secular holiday. The *Lynch* opinion used the three prongs of the *Lemon* test in its analysis.

The two religious displays here at issue were each located at or in a public building (the Allegheny County Courthouse and the City-County Building) "devoted to core functions of government", 842 F2d. at 662, including in each the chambers of the principal elected officials and legislative bodies as well as trial and appellate courts. The critical fact that neither religious symbol could reasonably be deemed to be subsumed by some larger display, as the appeals court stated, is further illustrated in the photograph introduced (Respondents Ex. 10, App. 396a), the uncontradicted testimony that the nativity scene substantially mirrors those found in Catholic churches, and in the photographs of the Menorah reproduced in petitioner Chabad's petition, page 4.

As is discussed in Section II, the Federal Courts of Appeal have consistently found such displays violative of the Establishment Clause.

II. The Federal Courts of Appeal are in agreement that any official display of a religious symbol at or in a public building devoted to core functions of government is violative of the Establishment Clause.

In an attempt to persuade the Court that this case falls within the parameters set forth in Rule 17, Supreme Court Rules, two of the petitioners (the County and the City) assert that there is a conflict among the circuits. The third

petitioner, Chabad, does not adopt that assertion although it references the majority opinion's description of "different approaches"—something quite different from a conflict. Obviously, differing and distinguishing fact patterns give rise to "different approaches". An analysis of the referenced opinions, however, shows clearly that there is no conflict in the circuits where the question raised is whether government may officially display a religious symbol in a public building devoted to core functions of government. Three circuits have now considered that question and they have uniformly held that such official displays violate the Establishment Clause. *American Civil Liberties Union v. City of Birmingham,* 791 F.2d 1561 (6th Cir. 1986), *cert. denied,* 107 S.Ct. 421 (1986); *American Jewish Congress v. City of Chicago,* 827 F.2d 120 (7th Cir. 1987); *American Civil Liberties Union v. County of Allegheny, supra.*

The attempt to "find" a circuit conflict is based upon the assumption that the Second Circuit holding in *McCreary v. Stone,* 739 F.2d 716 (2d Cir. 1984), *aff'd. by an equally divided Court sub nom Board of Trustees of Village of Scarsdale v. McCreary,* 471 U.S. 83 (1985), is in conflict with the Third Circuit's decision here and with the Sixth and Seventh Circuits as well. (Pet., City, 12; Pet., County, 14). Examination of *McCreary* shows that the facts there extant are simply not analogous to those here or in *Birmingham* or *Chicago. McCreary* dealt with a creche to be displayed by private parties in a public park which was a traditional public forum. The linchpin of that holding was the *public forum* analysis, as demonstrated by the court's long explanation of the various First Amendment uses for which the park was available. *McCreary,* 739 F.2d at 718-719. Indeed, the very first paragraph of the court's "discussion" explains that Boniface Circle, the park used,

was "a traditional public forum". *Id.* at 722. That critical fact is not present, nor was it in the Sixth and Seventh Circuit decisions.

In *American Civil Liberties Union v. City of Birmingham*, the Sixth Circuit struck down a city's official display of a freestanding nativity scene on the City Hall front lawn. It did so by carefully following and applying the *Lynch v. Donnelly* analysis. The opinion is not in conflict with the Second Circuit's holding as petitioners would suggest. The court, in discussing *McCreary*, specifically references the fact that the public forum issue was present in *McCreary (see, Birmingham,* 791 F.2d at 1565), as it was not in *Birmingham.* The Sixth Circuit's only suggestion of disagreement with *McCreary* was to the City's argument that that case should be construed as permitting placement of an unadorned creche in a prominent position at the government's official headquarters. *Birmingham,* 791 F.2d at 1566. Since the *McCreary* case did not involve any such official display but rather a city's refusal to allow a private group to display a nativity scene in a traditional public forum during the Christmas holiday season, *Birmingham* can hardly be deemed to be in disagreement with *McCreary.* The court's "disagreement" was with the argument advanced that *McCreary* should be extended to include religious displays at government headquarters.

In *American Jewish Congress v. City of Chicago,* the Seventh Circuit struck down, as violative of the Establishment Clause, the City's display of a free-standing creche (not part of a larger display) in the City Hall. The court reasoned that City Hall is a setting where the presence of government is "pervasive and inescapable". *Id.* 827 F.2d at 126. There, as here, the government offices were located in the site and the city council held its meetings there as

well. Bringing together "City Hall" and the church (via a creche), reasoned the court, unmistakably suggested their alliance. *Id.* The court noted *McCreary (id.* at 126, n. 2) but found it "uninstructive", as it took note of the different factors there present.

The recent decisions of other federal courts of appeal are consistent with the Third, Sixth and Seventh Circuit holdings with respect to official displays of religious symbols. In *American Civil Liberties Union v. City of St. Charles,* 794 F.2d 265 (7th Cir. 1986), *cert. denied,* 107 S.Ct. 458 (1986), the Seventh Circuit invalidated the City's display of a lighted latin cross on a city building during the Christmas holiday season. In *Friedman v. Board of County Commissioners of Bernalillo County,* 781 F.2d 777 (10th Cir. 1985) the Tenth Circuit struck down a county government's use of a seal which contained the latin cross and the Spanish motto meaning "with this we conquer". In *American Civil Liberties Union of Georgia v. Rabun County Chamber of Commerce, Inc.,* 698 F.2d 1098 (11th Cir. 1983), the Eleventh Circuit invalidated the display of a lighted latin cross in a state park. The courts of appeal are in clear agreement that any official display of a purely religious symbol by a government body violates the Establishment Clause. Obviously such displays at the seats of government fall into the most egregious category.

III. The Court of Appeals Decision is Not in Conflict with *Larson v. Valente.*

A. The Facts are not apposite.

Petitioner Chabad, without analysis, and with only two brief quotes from the case of *Larson v. Valente,* 456 U.S. 228 (1982), asserts a conflict of that opinion with the instant case. The actual *Larson* opinion, its reasoning and

its factual basis fails to support a 'conflict' analysis since the case deals with facts totally inapposite to those here. *Larson* dealt with the state's impermissible regulation of some religions. The case struck down a Minnesota statute that specifically discriminated against those religious organizations that solicit more than 50% of their funds from non-members, by imposing upon them certain registration and reporting requirements. No such discrimination is part of this case. There was never any balancing by the government of requests by religious groups or different treatment of religious requests by the governmental entities in the case now before this Court. There is no evidence to suggest that the Christmas tree was requested, sponsored by, or erected by anyone other than the City. In fact the record shows clearly otherwise.

Actually the inconsistency of Chabad's two proffered positions that, on the one hand, the Menorah display does not endorse religion because it is a "non-religious" object but that, on the other, it is necessary to "neutralize" an otherwise Christian symbol is obvious. If the Menorah does not connote the Jewish (or some other) religion then it can hardly be said to neutralize the governmental display of an object which, according to Chabad, connotes or endorses Christianity.

B. The issue of whether a Christmas tree is an "exclusively Christian" symbol was never raised in this case and is therefore waived.

Petitioner, Chabad, attempted to raise for the first time on appeal its assertion that the City's display, except for the Menorah, is otherwise "exclusively Christian". Indeed, Co-Petitioner, City of Pittsburgh moved the circuit court to strike that argument on the ground that it had

never been an issue in the district court proceedings. Since it was not an issue, no proof or argument was offered in this record and no findings on that issue were requested of or made by the district court. The Court of Appeals gave no consideration in its opinion to this assertion.

C. Chabad's asserted conflict with *Larson v. Valente* depends for its validity on two assumptions, neither of which is a fact or a holding in this case.

1. Assumption: The Christmas tree is a religious symbol.

Chabad's statement that the City "opened the steps of the City-County Building to the various Christian denominations that celebrate Christmas" (Pet., Chabad, 10) implies that the tree, like the Menorah, was placed and was owned by a religious group. Such implication is not only unsupported by the record, it is clearly contrary to the facts. As the Court of Appeals affirms, the City itself has installed the Christmas tree on the front steps to the main entrance of the City-County Building for many years. At the trial of this matter, neither Chabad nor any other party offered testimony or advanced argument that the Christmas tree was a Christian symbol, let alone that the Menorah's function was to neutralize it. No findings were ever requested nor were any made with respect to this assertion. Certainly Chabad never requested nor asked the court to consider a requirement that the City remove the tree if the Menorah were not permitted to be displayed. Furthermore, Chabad cites no authority for its bald assertion that a Christmas tree is Christian and not a secular symbol, totally ignoring the suggestion to the contrary in the few cases that have considered this question.[2]

[2] *See*, for example, *St. Charles*, 794 F.2d at 271.

2. Assumption: The Menorah "neutralizes" the Christmas tree.

Chabad's neutralization or curative analysis fails, unless one accepts its proffered "effect" that the placement of an 18 foot Menorah off to one side of a 45 foot high Christmas tree, atop a 20 foot platform, centered at the entrance to the government building, somehow conveys a message that the City of Pittsburgh is neutral or even-handed toward religion.

In fact, the message might more logically be said to be that the City of Pittsburgh endorses two religions. Clearly the preferred religion is Christianity (if one accepts Chabad's assumption) with its overpowering centrally displayed symbol, but as a secondary choice, it approves the Jewish religion as well. The suggestion that a display that advances Christianity and Judaism is one that is required by *Larson v. Valente* ignores the message conveyed to those who are neither Christians nor Jews. The record, as to the religious makeup of the area clearly shows that it includes Moslems, Unitarians, (App. 38a) (indeed one of the respondents is a Moslem and another a Unitarian minister), Buddhists and atheists. Moreover, the record is clear that Moslems object to any sort of religious display. (App. 143a-144a).

Chabad's suggestion that *Larson* requires or teaches that a symbol of one religion must be balanced by the countervailing religious symbols of another ignores the multi-religious makeup of most American cities and this Court's teaching in *School District of the City of Grand Rapids v. Ball*, 473 U.S. 373, 389 (1985) (emphasis added), that "Government promotes religion as effectively when it

fosters a close identification of its powers and responsibilities *with those of any - or - all religious denominations* as when it attempts to inculcate specific religious doctrines."

Petitioner, Chabad, suggests that the Court may wish to grant its Petition for Certiorari to resolve the constitutional questions raised by the presence of a Menorah adjacent to a publicly sponsored Christmas tree without revisiting the issues discussed in *Lynch v. Donnelly.* Were the Court desirous of resolving that issue, respondents respectfully suggest that the factual posture of this case is such that it would be a poor vehicle for making such analysis. Because the arguments now proffered by Chabad were not raised in the district court, the issues of a Christmas tree's being a Christian symbol and of a Menorah's neutralizing that symbol have not here been litigated. It is respectfully submitted therefore that the many cases cited by Chabad (Pet., Chabad, 11 and 12) which apparently focus on the issues it now raises will afford more appropriate opportunities for full anaylsis, review, and clarification.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 87-2050

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

COUNTY OF ALLEGHENY, CITY OF PITTSBURGH, AND CHABAD,

Petitioners,

v.

AMERICAN CIVIL LIBERTIES UNION GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HOWARD ELBLING, HILARY SPATZ LEVINE, MAX A. LEVINE AND MALIK TUNADOR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT MALIK TUNADOR'S BRIEF IN OPPOSITION

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Question Presented

Whether the establishment clause of the first amendment prohibits the County of Allegheny and the City of Pittsburgh from erecting religious displays, including a Nativity scene and a Chanukah Menorah, on the premises of the County Courthouse and the City-County Building.

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Statement of the Case

Each year, the County of Allegheny and the City of Pittsburgh place sectarian religious displays on the premises of the buildings which house their government offices. The Courthouse Nativity scene contains figurines representing the Virgin Mary and Joseph kneeling in front of a baby Jesus attended by three kneeling shepherds whose hands are clasped in prayer. The shepherds represent the three wise men who travelled to witness the birth of Jesus as recounted in Matthew 2:11-12. An angel rests on the roof of the barn, holding a banner bearing the Latin inscription "Glory In Excelsis Deo," or "Glory to God in the Highest," taken from Luke 2:1.

A large Chanukah Menorah stands on the steps of Pittsburgh's City-County Building. The Chanukah Menorah is a religious symbol commemorating miracles associated with the Jewish holiday of Chanukah, which marks the redemption of the ancient temple by the Jews. *Lubavitch of Iowa, Inc. v. Walters*, 684 F.Supp 610 (S.D. Iowa 1988), *aff'd*, 806 F.2d 12 (7th Cir. 1988). E. Royston Pike, *Encyclopaedia of Religion and Religions* 171 (1958).

Anyone passing or entering the Allegheny County Courthouse or Pittsburgh's City-County Building cannot avoid seeing these religious displays. In addition to various courts, the Allegheny Courthouse contains the Sheriff's office, the offices of the County Treasurer, County Controller, County Commissioner, and the County Clerk. The Pittsburgh City-County Building houses the Mayor's office, the City Council, the City Treasurer, some civil courts and other minor governmental offices.

The American Civil Liberties Union and individuals of various religious faiths initiated this lawsuit in district court to restrain Allegheny County from maintaining the Nativity scene at the County Courthouse and to restrain the City of Pittsburgh from erecting a Menorah at the City-County Building. Following a hearing on December 15, 1986, the district judge denied the requested preliminary injunction. Following a second hearing, the district judge entered an order denying the plaintiffs' motion for a permanent injunction and for declaratory relief. The plaintiffs appealed, and a majority of a panel of the United States Court of Appeals for the Third Circuit

reversed the district judge. The Third Circuit applied the tripartite establishment clause analysis developed by this Court in *Lemon v. Kurtzman*, 403 U.S. 603 (1971) and held that the religious displays violated the second prong of the *Lemon* test by having the effect of government endorsement of religion.

REASONS FOR DENYING THE WRIT

Summary of Argument

The writ should be denied because the Third Circuit decision is fully consonant with the decisions of this Court. The Third Circuit properly applied *Lynch v. Donnelly*, 465 U.S. 602 (1984) and *Lemon v. Kurtzman*, this Court's decisions governing religious displays under the establishment clause. The decision of the court of appeals is also consistent with all of the applicable circuit and district court decisions holding unconstitutional the display of religious symbols at the seat of government. Finally, the specious argument that the display of a Christmas tree at City Hall requires the city to also allow the display of a Chanukah Menorah does not warrant the granting of a writ.

I. THE DECISION OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT COMPLIES WITH THE APPLICABLE DECISIONS OF THIS COURT, INCLUDING *LYNCH V. DONNELLY*.

A. The Third Circuit Decision Complies with *Lynch v. Donnelly*, *Lemon v. Kurtzman* and the Applicable Decisions of Other Federal Courts.

The Third Circuit properly applied the tripartite establishment clause analysis developed in *Lemon v. Kurtzman*.[1] In *Lynch*, while emphasizing the context of the creche, this Court reaffirmed the vital role of the *Lemon* test in determining the constitutionality of religious symbols under the establishment clause. *Lynch* upheld under the establishment clause limited government financial support for a

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[1] To pass constitutional muster under the establishment clause, the challenged government activity must have a secular purpose, its primary effect must neither advance nor inhibit religion, and it must not foster excessive government entanglement with religion. *See* 403 U.S. 603, 612-613 (1971).

creche surrounded by secular symbols which was erected by a private merchants association and which sat on private property. 465 U.S. at 684.

The Third Circuit decision in no way conflicts with or evades *Lynch*. The court of appeals acknowledged the role of *Lynch* in analyzing the constitutionality of government support for religious displays, 842 F.2d at 660, but the court below also recognized the crucial factual distinctions between *Lynch* and the present case. As in *Lynch*, this case involves profoundly religious symbols. *See Lynch*, 465 U.S. at 685; *see also Lubavitch of Iowa*, 684 F. Supp. 610 (Chanukah Menorah constitutes a religious symbol). Chabad's *cert.* petition itself concedes that the Chanukah Menorah represents a Jewish religious symbol. Unlike *Lynch*, however, where the religious symbol sat on private property, the religious symbols in the present case sit on a particular and unique form of government property: the buildings which house and represent local political authority.

The display of religious symbols on the premises of the seats of government of the county and city differs entirely from the Nativity scenes in *Lynch* and in *McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984), *aff'd by an equally divided court*, 471 U.S. 83 (1985), neither of which stood on the grounds of the offices of the government. Consequently, in applying the *Lemon* test, the Third Circuit properly took guidance from the decisions of other circuits holding unconstitutional the display of religious symbols on the premises of political office buildings.

In *American Jewish Congress v. City of Chicago*, 827 F.2d 120 (7th Cir. 1987), the Seventh Circuit held that the establishment clause prohibits the display of religious symbols on the premises of the Chicago City-County Building, a context which mirrors the present case. The Seventh Circuit analyzed the impermissible message of government endorsement of religion communicated by a privately-owned creche which was prominently displayed in the lobby of the Chicago City-County Building:

> The presence of government in Chicago's City Hall is unavoidable. . . . [E]very display and activity in the building is implicitly marked with the stamp of government approval. The pres-

> ence of a Nativity scene in the lobby, therefore, inevitably creates a clear and strong impression that the local government tacitly endorses Christianity.

827 F.2d at 128.

Similarly, in *American Civil Liberties Union v. City of Birmingham*, 791 F.2d 1551 (6th Cir.), *cert. denied*, ___ U.S. ___, 107 S.Ct. 421 (1986), another decision involving the display of a Nativity scene at City Hall, the Sixth Circuit concluded:

> It is difficult to believe that the city's practice of displaying an unadorned creche on the City Hall lawn would not convey . . . the message that the City endorses Christianity.

791 F.2d at 1556.

In the present case, the court of appeals recognized the distinctions between *Lynch* and cases in which the challenged religious symbols are displayed on government property. The court correctly applied the *Lemon* test and therefore the writ of *certiorari* should be denied.

B. Religious Symbols on Government Property Unconstitutionally Detract from Nonadherents' Standing in the Political Community.

Nativity scenes and Menorahs on the grounds of courthouses and city halls result in government endorsement of religion. In her concurring opinion in *Lynch*, Justice O'Connor explained the political rationale underlying the establishment clause's prohibition of such endorsement:

> Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.

465 U.S. at 688.

When the government's daily operations are carried out in the shadow of a Menorah or a creche, the nonadherent's stature as a member of the political community is diminished. The Allegheny County Courthouse and the Pittsburgh City-County Building house the machinery of local government. It is in these buildings that one

pays taxes, records interest in real estate, seeks the authority of government to redress wrongs, both civil and criminal, and in which politicians reach decisions which control the affairs of the community. Although the wall which separates church and state is not impenetrable, it must keep religious symbols apart from the buildings which house the core functions of our democratic system.

C. The Third Circuit Adhered to this Court's Longstanding Sensitivity to the Perception of Government Endorsement of Religion Created by the Physical Context of Religious Activities.

In distinguishing the setting of the present Nativity scene and Menorah from the *Lynch* creche, the Third Circuit complied with this Court's longstanding concern for the perceptions created by the physical context of religious activities and government. For example, this Court has long treated religious activities on public property differently from similar government support for religious activities taking place elsewhere. *Compare McCollum v. Board of Education*, 333 U.S. 203 (1948) (holding that the establishment clause prohibits voluntary religious instruction on school premises) *with Zorach v. Clauson*, 343 U.S. 307 (1952) (holding that a similar program conducted off school property passes constitutional muster). *See also Aguilar v. Felton*, 473 U.S. 402 (1985); *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985); *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963).

These decisions all hold unconstitutional the perception of government endorsement of religion which results from religious activities or symbols occurring within the confines of the nation's public schools, a form of publicly-owned property embodying the power of the state. The Third Circuit, following the decisions of its sister circuits, recognized that for the purposes of analyzing religious displays under the establishment clause, courthouses and city halls also represent a unique form of government-owned property. The writ should be denied because the Third Circuit not only complied with *Lynch* and *Lemon*, but the court below also complied with the many decisions of this Court which recognize the perception of unconstitutional government endorsement of religion resulting when religious activities occur in the context of government authority.

II. THERE IS NO CONFLICT BETWEEN THE CIRCUITS REGARDING THE UNCONSTITUTIONALITY OF THE DISPLAY OF RELIGIOUS SYMBOLS ON GOVERMENT PROPERTY.

Every circuit court to address the display of religious symbols on the type of government property presented in this case has held that such displays violate the establishment clause of the first amendment; therefore, the writ should be denied. *A.J. Congress v. City of Chicago*, 827 F.2d 120; *A.C.L.U. v. City of Birmingham*, 791 F.2d 1561; *A.C.L.U. v. City of St. Charles*, 794 F.2d 265 (7th Cir. 1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 458 (1986). Many district courts also have held that the establishment clause forbids the display of religious symbols on government property. *E.g., Lubavitch of Iowa, Inc.*, 684 F.Supp. 610; *A.C.L.U. v. Miss. State GSA*, 652 F.Supp. 380 (D.Miss. 1986); *Burelle v. City of Nashua*, 599 F.Supp. 792 (D.N.H. 1984). Relying on *Lemon*, these cases uniformly hold unconstitutional the display of religious symbols on the premises of property which house the key functions of government. The Third Circuit now joins the many courts which have acknowledged this principle.

McCreary v. Stone is the only circuit court decision to uphold a creche on public property. Since the *Scarsdale* creche was situated in a traditionally public forum, the *McCreary* court, relying upon *Widmar v. Vincent*, 454 U.S. 236 (1981), focused on the right to free expression in a public forum under the first amendment, 739 F.2d at 723. Significantly, the *McCreary* court did not view a privately sponsored creche as communicating a message of government endorsement or approval. To the contrary, the Second Circuit specifically held that such expression in a public forum does not bear the imprimatur of government approval. 739 F.2d at 727.

In sharp contrast to the public park in *McCreary*, the Allegheny County Courthouse and the Pittsburgh City-County building involved in this case do not constitute public forums. Not all publicly owned property constitutes a public forum. *Hazelwood v. Kuhlmeier*, ___ U.S. ___, 108 S.Ct. 562 (1988). The decision below differs from *McCreary*, but the two decisions are not inconsistent.

III. THE ESTABLISHMENT CLAUSE PROHIBITS AID TO ONE OR MORE RELIGIONS.

Petitioner Chabad's novel argument that the display of a Christmas tree requires the City of Pittsburgh to allow the display of a Chanukah Menorah also does not warrant the granting of a writ. That argument, presented in Chabad's petition for *certiorari*, eviscerates the meaning and purpose of the establishment clause. Chabad's petition acknowledges that the display of religious symbols at the seat of local government unconstitutionally endorses religion, contending, "the Menorah's principal effect is to mitigate the one-sided encouragement or appearance of official endorsement conveyed by a large Christmas tree on the steps of the city's public building." Petition for writ of *cert.* of Chabad at 7-8. While the constitutionality of the Christmas tree is not at issue here, even if the tree were a religious symbol like the Nativity scene, the argument that the first amendment better tolerates two violations of the establishment clause than one defies common sense.[2]

Chabad would ground this novel restatement of the first amendment upon putative neutrality principles. The establishment clause, however, prohibits aid to any or all religions. *See Everson v. Board of Education*, 330 U.S. 1 (1984). *See also Wallace v. Jaffree*, 472 U.S. 38 (1985); *McCollum v. Board of Education*, 333 U.S. 203 (1948). In *Everson*, this Court explained:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.

330 U.S. at 15.

The Chabad petition relies upon *dicta* drawn from *Larson v. Valente*, 456 U.S. 228 (1982), stating that "one religious denomination cannot be officially preferred over another." 456 U.S. at 245. To place a Menorah, a creche, a Buddha, or any other religious

---

[2] In *Lynch*, this Court indicated that a Christmas tree does not constitute a religious symbol. 465 U.S. at 685. *See also City of St. Charles*, 794 F.2d at 271.

symbol inside a courthouse or a city hall, however, effects precisely that unconstitutional result. Adding another religious display in no way mitigates the appearance of official religious preferences. Moreover, Chabad's argument would have the government identify and represent every religious faith, which inevitably would result in impermissible entanglement as governmental authorities try to distinguish among the various faiths wishing to be represented in the City-County building. *Lemon*, 402 U.S. at 612-613.

The purpose of the establishment clause is to protect the rights of religious minorities. *See Grand Rapids*, 473 U.S. at 382. Yet Chabad's peculiar reasoning reduces America's religious pluralism to only two mainstream faiths, Christianity and Judaism. As America's religious diversity continues to expand, however, the establishment clause mandate against government sponsorship of religion becomes ever more important. *Abington v. Schempp*, 374 U.S. at 222. All religious faiths are undermined by the display of a Jewish or a Christian symbol, or both, on the premises of buildings which house the offices representing the government. *Engel v. Vitale*, 370 U.S. 421, 430-431 (1962).

Conclusion

For the reasons set forth above, Respondent Malik Tunador respectfully urges this Court to deny the petition for a writ of *certiorari*.

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Nos. 87-2050, 88-90, 88-96

Supreme Court, U.S.
FILED
NOV 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the
Supreme Court of the United States

October Term, 1988

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania and the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania, *Petitioners,*

and

CHABAD, *Petitioner,*

vs.

AMERICAN CIVIL LIBERTIES UNION GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HOWARD ELBLING, HILARY SPATZ LEVINE, MAX A. LEVINE and MALIK TUNADOR, *Respondents,*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Joint Appendix

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Petitioner, City of Pittsburgh, July 16, 1988
Petitioner, Chabad, July 15, 1988
Certiorari Granted October 3, 1988

328 (1)

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The following Opinions and Orders have been omitted from this Joint Appendix because they appear in all Petitions for Certiorari filed herein. For convenience of reference, they appear on the following pages of the Petition for Writ of Certiorari filed by the County of Allegheny herein:

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*A list of corrections to the Transcripts appears at of this Appendix.

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Exhibits are contained in a separate volume pursuant to Rule 30.6

The United States Court of Appeals

FOR THE THIRD CIRCUIT

AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HOWARD ELBLING, HILARY SPATZ LEVINE, MAX A. LEVINE and MALIK TUNADOR,

Appellants

v.

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania and the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania,

Appellees

and

CHABAD,

Intervenor

DOCKET NOS. 87-3395 and 87-3436

Date	**Relevant Filings**
1987	
Sept. 22	Motion by Appellant to consolidate appeals 87-3395 and 87-3436.
Sept. 24	Order granting above motion. Appeals 87-3395 and 87-3436 are consolidated for purposes of briefing and disposition.

Date	Relevant Filings
1988	
Mar. 28	Petition for Rehearing before the Court In Banc by City of Pittsburgh. (cvs. 87-3395 and 87-3436)
Mar. 28	Petition for Rehearing before the Court In Banc by Chabad. (cvs. 87-3395 and 3436).
Apr. 19	Order (Gibbons, Chief Judge, Seitz, Higginbotham, Sloviter, Becker Stapleton, Mansmann *Greenberg*, Hutchinson Scirica Cowen and Weis, Cir. Judges), denying the petitions for rehearing by appellees, County of Allegheny, City of Pittsburgh and Chabad. When the cases were decided J. Weis was an active judge but he is now assumed senior status and has participated in the decision on the petitions as a Senior Judge. J. Higginbotham, Stapleton, Mansmann Hutchinson & Scirica would grant rehearing by the Court In Banc. J. Weis would grant panel rehearing.
May 18	Order (Gibbons, Chief Judge, *Greenberg* and Weis, *Cir. Judges*) denying motion (by County of Allegheny) to stay of mandate pending pet. for writ of cer.
May 18	Order (Gibbons, Chief Judge, *Greenberg* and Weis, *Cir. Judges*) denying motion (by City of Pittsburgh) to stay of mandate pending pet. for writ of cert.

The United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HOWARD ELPING, HILARY SPATZ LEVINE, MAX A. LEVINE and MALIK TUNADOR,

Plaintiffs

v.

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania and the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania,

Defendants

and

CHABAD,

Intervenor

CIVIL ACTION NO. 86-2617

Date	N.R.	Proceedings
1986		
Dec. 10	1	Complaint filed.
Dec. 10	2	Application for TRO with proposed order filed.
Dec. 10	3	Motion for preliminary injunction filed with proposed order.
Dec. 12	4	Order entered directing that a hearing on a motion for a preliminary injunction will be held on 12-15-86.

Date	N.R.	Proceedings
Dec. 15	5	Amended complaint by plfs.
Dec. 16	7	Hearing, McCune, J. 12-15. Memo filed.
Dec. 29	10	Answer to Amended Complaint filed by defendant, County of Allegheny.
Dec. 30	11	Motion to Dismiss filed by defendant City of Pittsburgh.
1987		
Jan. 16	14	Motion of Chabad to Intervene & to Adduce Limited Evidence filed with proposed order.
Jan. 22	16	Motion to Dismiss filed by Chabad.
Jan. 30	17	Stipulation re: Nativity scene filed by counsel.
Jan. 30	18	Stipulation re: Menorah filed by counsel.
Jan. 30	19	Stipulation re: record being considered complete & serving as the record for purpose of courts ruling on plaintiffs request for preliminary injunction filed.
Feb. 18	22	Answer of City of Pittsburgh to Chabad's Motion in Opposition to Stipulation filed.
Feb. 19	25	Response of plaintiffs represented by the American Civil Liberties Union in opposition to the Motion to Intervene and adduce limited testimony by Chabad filed.
Mar. 17	26	Order 3-16 that Motion of Chabad to Intervene and to adduce limited evidence is granted.

Date	N.R.	Proceedings
Apr. 27	28	Hearing on Chabad's Making of a record began and concluded on 4/27/87; memo filed.
May 8	30	Memorandum opinion filed & order entered directing that motion of the city to dismiss is denied. However the motions for a permanent injunction and for declaratory relief are denied.
May 29	29	Pursuant to order entered, judgment is hereby entered for defendant and against plaintiff.
June 1	32	Notice of Appeal from final judgment order dated 5/29/87 filed by plaintiffs.
June 22	34	Notice of appeal from order of 5/8/87 & 5/29/87 filed by plaintiff Malik Tunador.

United States Court of Appeals

FOR THE THIRD CIRCUIT

Nos. 87-3395 & 87-3436

AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HOWARD ELBLING, HILARY SPATZ LEVINE, MAX A. LEVINE and MALIK TUNADOR,

v.

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania and the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania,

CHABAD,

Intervenor

AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HOWARD ELBLING, HILARY SPATZ LEVINE, MAX A. LEVINE,

Appellants No. 87-3395

MALIK TUNADOR,

Appellant No. 87-3436

On Appeal from the United States District Court for the Western District of Pennsylvania D.C. Civil No. 86-2617

Present: GIBBONS, *Chief Judge,* WEIS and GREENBERG, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel January 20, 1988.

Nos. 87-3395 & 87-3436

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court entered May 8, 1987 and May 29, 1987, be, and the same are hereby reversed and the cause remanded to the said District Court for further proceedings consistent with the opinion of this Court. Costs taxed against the appellees.

ATTEST:

/s/ SALLY MRVOS

Clerk

[180]

THE COURT: Let the record show that it's about 5:25, the court room has been occupied by a number of people all day who apparently are awaiting the decision on this Motion for a Preliminary Injunction which seeks to enjoin both the County and City.

[181]

Let the record show that, therefore, we'll briefly state some short findings of fact and make a decision here.

The Motion for a Preliminary Injunction against the City and against the County will be denied.

This case presents a Motion for a Preliminary Injunction under the Establishment Clause, the First Amendment as applied to the States through the Fourteenth Amendment. In my view, the case of Lynch vs. Donnelly is the last teaching that I can find in this field, and I think this case is governed by it, although the facts are not the same. The facts, of course, are never precisely the same in any of the Establishment Clause cases.

Let the record show that in this case the City proposes to erect a menorah in front of the City Building on approximately December the 27th, and there is already erected and has been erected since November 26th on the main staircase of the County Courthouse a display which contains a nativity scene, sometimes spoken of as a creche. The display is shown in Exhibits D and F and various of the exhibits made part of the record.

The creche scene is a traditional one, not particularly large, not particularly small. It's surrounded by red and white Poinsettas and surrounded by a fence and sits upon the stairwell. It's part of a holiday celebration that the County Commissioners apparently foster and encourage, where every day during the Christmas season choirs come to this part of the [182] Courthouse and assemble and sing

music of various kinds, including some carols and some hymns, and some religious music, some secular music. The program is well received. The Christmas decorations, of course, are part of the program.

There are some evergreen trees in other parts of the Courthouse. This particular place in the Courthouse is a beautiful, impressive place with murals on the walls which are lighted. Some of them show fallen warriors and angels and scenes of various kinds. One of the pictures shows the choir of one of the high schools involved standing behind the creche, and generally the creche merely contributes as part of the overall Christmas scene.

The menorah we have no pictures of. We understand what a menorah is and have seen one before and have seen them in Christmas displays. The City proposes to place the menorah on the steps of the City Building.

We find that the display of either the nativity scene or the menorah fails to convey a message of governmental enforcement of either religion. We find that the mere display presents no appreciable risk of establishing either religion.

To put it another way, the displays here both of the nativity scene presently in place and the proposed placing of the menorah are de minimis in the context of the application of the Establishment Clause. It is noted that none of the people who enter the Courthouse are required to do anything; [183] they are not required to read, or to sing, or to pause or to reflect. Neither are people required to pause or look or read or make any gestures where the menorah is concerned; they are merely displays.

They are said to be offensive. We think the people who have testified are sincere people and truthful, and they say that they find these displays offensive, but the Governments of the United States, Local and State and Federal do

many things that are offensive to many people, and I find that mere offense is not sufficient to impel the Court to issue an injunction. There must be more substantial injury than mere offense that is felt inwardly. But it is not felt because one must read, or sing, or talk or pause, or do something affirmatively.

The mere displays, therefore, are found to be de minimis in the context of the First Amendment. I don't think there's any danger whatever that they will establish any religion. I don't think the County Commissioners or the Mayor and the City intend to affect anyone's religion, or even offend anyone. On the contrary, I think the intention was to celebrate the holiday season, and I doubt that the County or City officials paused to think that they were offending anyone. So, therefore, I just do not see very much chance of the plaintiffs succeeding on the merits. I don't think that there has really been any appreciable harm. I don't think that the mere reference [184] to religion is actionable.

Those findings, as brief and as incomplete as they are, are sufficient for this purpose, and we'll recess for the night.

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AMERICAN CIVIL LIBERTIES UNION, et al.,
Plaintiff

vs.

COUNTY OF ALLEGHENY and THE CITY OF PITTSBURGH,
Defendants

Civil Action No. 86-2617

ORDER

AND NOW, May 29, 1987 in accordance with the Memorandum Opinion and Order of May 8, 1987 Judgment is hereby entered in favor of the Defendants and against the Plaintiff.

/s/ BARRON P. MCCUNE

Barron P. McCune
Senior United States
District Judge

cc: James B. Lieber, Esq.
Roslyn M. Litman, Esq.
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Charles H. Saul, Esq.

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HOWARD ELBLING, HILARY SPATZ LEVINE, MAX A. LEVINE and MALIK TUNADOR,
Plaintiffs

v.

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania and the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania,
Defendants

Civil Action No. 86-2617

AMENDED COMPLAINT

Plaintiffs bring this action against Allegheny County and the City of Pittsburgh to enjoin those governmental entities from violating the Establishment Clause of the First Amendment to the United States Constitution and 42 U.S.C. §1983 by storing, maintaining, erecting and/or displaying religious symbols inside the Allegheny County Courthouse and in front of the main entrance to the City-County Building. These two buildings serve as the seats of government for both County and City governments and house the Allegheny County Courts of Common Pleas.

I. JURISDICTION

1. Jurisdiction to hear Plaintiffs' claims is conferred upon this court by 28 U.S.C. §1343 (3) concerning the

original jurisdiction of the district courts to award appropriate relief for the violation, under color of state law, of any constitutional right or federal statute providing for the protection of civil rights.

II. PARTIES

2. Plaintiff American Civil Liberties Union, Greater Pittsburgh Chapter (hereinafter "ACLU"), is a voluntary non-profit organization dedicated to preserving and protecting the civil rights and civil liberties secured by the United States Constitution. The majority of ACLU's members are tax paying residents of the City of Pittsburgh and County of Allegheny. ACLU brings this action, on behalf of its members, due to concerns that the use of religious symbols herein described have the effect of the government's promoting certain religions over others, of establishing those religions as officially sanctioned religions, of diminishing and trivializing the religious significance of the symbols and undermining the Constitution's principle of separation of church and state. Many ACLU members are lawyers whose profession requires them to attend proceedings in the Allegheny County Courthouse and in the City-County Building during the time the religious symbols are on display. Additionally, ACLU has numerous clients who are parties to cases which are routinely litigated in the Courthouse and in the City-County Building.

3. Plaintiff Ellen Doyle is a property owner and taxpaying resident of Defendants County of Allegheny and City of Pittsburgh. She serves as ACLU's chairperson and is a lawyer who has occasion to practice in the Allegheny County Courts.

4. Plaintiff Michael Antol is a taxpaying resident of Allegheny County. He is a lawyer with the Neighborhood Legal Services Association who regularly appears before

the Allegheny County Courts located in the Courthouse and in the City-County Building.

5. Plaintiff Reverend Wendy L. Colby is a registered voter and taxpaying resident of Defendant County of Allegheny. She is the minister of the Unitarian Universalist Church of the North Hills.

6. Plaintiff Howard Elbling is a property owner and taxpaying resident of Defendants County of Allegheny and City of Pittsburgh. He is a lawyer who is employed as a law clerk by one of the Judges of the Allegheny County Court of Common Pleas whose courtroom is located in the Allegheny County Courthouse. As a law clerk, Mr. Elbling is regularly required to be present in the Courthouse.

7. Plaintiff Hilary Spatz Levine is a property owner and taxpaying resident of Defendants County of Allegheny and City of Pittsburgh. She is an attorney who engages in the private practice of law who regularly appears before the Allegheny County Courts located in the Allegheny County Courthouse and the City-County Building.

8. Plaintiff Max A. Levine is a property owner and taxpaying resident of Defendants County of Allegheny and City of Pittsburgh. He is an attorney who engages in the private practice of law who regularly appears before the Allegheny County Courts located in the Allegheny County Courthouse and the City-County Building.

9. Malik Tunador is a property owner and taxpaying resident of the Allegheny County. Having been born and raised in Turkey, Mr. Tunador has been a naturalized United States citizen for approximately twenty years. He is a member of the Muslim faith.

10. Defendant County of Allegheny is a political subdivision of the Commonwealth of Pennsylvania. It owns the Allegheny County Courthouse.

11. Defendant City of Pittsburgh is a political subdivision of the Commonwealth of Pennsylvania. It, together with Allegheny County, owns the City-County Building.

III. FACTS

12. On or about November 26, 1986, a creche (commonly referred to as a nativity scene) was erected inside the main entrance of the Allegheny County Courthouse.

13. The creche is prominently displayed on the steps and first floor landing of the Courthouse. It is visible to untold numbers of Allegheny County residents coming to the Courthouse to conduct official business.

14. The creche's appearance in the Courthouse constitutes a religious depiction of the birth of Jesus Christ. Several human figures are portrayed on their knees with hands clasped as if in prayer. On top of the manger is a winged angel with a banner bearing the Latin inscription "GLORIA IN EXCELSIS DEO" (Glory to God in the highest). The quotation is from the Gospel of Luke, 2:14.

15. A sign informs the viewer that the display has been "Donated By The Holy Name Society".

16. On information and belief, it is averred that:

a. the display is erected by County employees at County expense;

b. the display is stored on County property when not erected; and

c. the display is guarded and maintained by County employees who receive County salaries.

17. A substantially identical display has appeared in the Courthouse in recent years. Each year, shortly after Christmas, the creche is dismantled by County employees and placed back in storage on County property.

18. Prior to the erection of the 1986 creche, Plaintiff ACLU wrote to the County Commissioners requesting that Defendant Allegheny County refrain from placing religious symbols inside the Courthouse. Defendant Allegheny County denied Plaintiff ACLU's written request.

19. The County Courthouse represents the seat of government for Defendant County of Allegheny in the following particulars among others:

a. The County Commissioners, the County's principal governing body, meet and maintain offices in the Courthouse.

b. A majority of Allegheny County Court of Common Pleas Criminal Division trials are conducted in the Courthouse.

c. Civil cases involving amounts not in excess of $20,000 are initially heard in the Courthouse.

d. The Allegheny County Clerk of Courts is located in the Courthouse.

e. The Allegheny County Controller maintains his office there.

f. Treasurer/Sheriff as well as numerous official offices, are located in the Courthouse.

20. In previous years, a large menorah has been constructed next to Defendant City of Pittsburgh's Christmas tree which is displayed on the steps of the main entrance to the City-County Building.

21. The menorah, a religious symbol in the form of a candelabra, is used by members of the Jewish religion as part of the Celebration of Chanukah.

22. The City County Building is owned and operated jointly by defendants Allegheny County and City of Pittsburgh.

23. On information and belief, it is averred that:

a. the display is erected by City employees at City expense.

b. the display is stored on City property when not erected; and

c. the display is guarded and maintained by City employees who receive City salaries.

24. By letter dated November 13, 1986 (attached as "Exhibit A") Plaintiff Ellen Doyle wrote to City of Pittsburgh Mayor Richard Caliguiri requesting that the City refrain from permitting religious displays at the building housing the seat of City government. By letter dated November 18, 1986 (attached as "Exhibit B"), Mayor Caliguiri stated his intention to repeat the same display this year.

25. Mayor Caliguiri's letter gives rise to the reasonable expectation that the menorah will be placed at the City-County Building within the next few weeks.

26. The City-County Building, like the Courthouse, houses numerous governmental and official offices. The following can be found at the City-County Building:

a. The Mayor's Office

b. City-Council Chambers

c. Allegheny County Prothonotary

d. Marriage License Bureau

e. City Treasurer

f. Pittsburgh Commission on Human Relations

g. Allegheny County Bar Association

h. Allegheny County Law Library

i. Allegheny County Court of Common Pleas, Civil, Orphans and Family Divisions

j. Register of Wills

k. Pennsylvania Supreme Court Prothonotary

l. City of Pittsburgh Parks and Recreation

27. At all times and in all conduct relevant to the matters alleged in this Complaint, Defendants have pursued local governmental practices, policies and customs and have done so under color of state law.

IV. LEGAL CLAIMS

28. The expenditure of public funds upon and/or the display of each of the previously described religious symbols violates the First and Fourteenth Amendments to the United States Constitution which prohibit governmental bodies from establishing or becoming excessively entangled with any religion.

29. The conduct of each Defendant, in permitting the expenditures and displays at issue, gives rise to a cause of action under 42 U.S.C. §1983 in that Defendants, while acting under color of state law, have violated the rights of each Plaintiff to be free from an establishment of religion.

30. Plaintiffs have suffered and continue to suffer irreparable injury by virtue of Defendant's actions, as described above, and they are without an adequate remedy at law with which to redress the aforementioned constitutional violations.

WHEREFORE, Plaintiffs request entry of the following relief:

1. A declaratory judgment declaring that the expenditure of public funds for the storage, erection, display and maintenance of a creche in the County Courthouse and for the storage, erection, maintenance and display of a menorah on or about the City-County Building and the display and maintenance of the creche and menorah in the Courthouse and on or about the City-County Building violate the First and Fourteenth Amendments to the United States Constitution.

2. A temporary restraining order and preliminary and permanent injunctions prohibiting Defendants from expending public resources for the display of a creche and/or a menorah and from storing, erecting, maintaining and displaying a creche and/or a menorah on or in the Allegheny County Courthouse and City-County Building.

3. An award of nominal damages.

4. An award of costs and reasonable attorneys fees to Plaintiff pursuant to 42 U.S.C. §1988.

5. Such other relief as the court may deem just and equitable.

Respectfully submitted,
On Behalf of American Civil
Liberties Union Greater
Pittsburgh Chapter
237 Oakland Avenue
Pittsburgh, PA. 15213

/s/ JAMES B. LIEBER

James B. Lieber, Esq.
American Civil Liberties Union
237 Oakland Avenue
Pittsburgh, PA 15213

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HILARY SPATZ LEVINE, MAX A. LEVINE and MALIK TUNADOR

Plaintiffs

v.

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania and the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania,

Defendants

Civil Action No.

MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs, by their counsel, request the court to enter a preliminary injunction enjoining Defendants, their officers, agents, and employees from displaying, maintaining, erecting or storing a creche, on the premises of the Allegheny County Courthouse and from displaying, maintaining, erecting or storing a menorah on the City-County Building property and/or expending public resources of any kind for the display, maintenance, erection or storage of a creche or a menorah on the grounds that immediate and irreparable injury will result to Plaintiffs. The following matters are brought to the court's attention in support of this Motion:

1. Plaintiffs incorporate by reference each and every allegation contained in their Complaint as if all said allegations were fully set forth in this Motion:

2. The conduct of Defendants in displaying, maintaining, erecting and storing a creche and/or menorah in or on governmental building property used as the seat of county and city government and the expenditure of public resources for said purposes is in violation of the establishment clause of the First Amendment as incorporated by the Fourteenth Amendment.

3. Plaintiffs have demonstrated a strong likelihood that they will succeed on the merits of this action.

4. If Defendants are permitted to engage in the conduct complained of, Plaintiffs will continue to suffer immediate and irreparable harm.

5. Plaintiffs are without an adequate remedy at law with which to redress the constitutional violations at issue.

6. An order enjoining and restraining Defendants from engaging in the complained of conduct will cause considerably less harm to Defendants than that which will be suffered by Plaintiffs should the court deny the requested preliminary relief.

WHEREFORE, Plaintiffs request the entry of a preliminary injunction enjoining Defendants from displaying, erecting, maintaining or storing a creche and/or menorah on the grounds of the Allegheny County Courthouse or City-County Building.

Respectfully submitted,
On Behalf Of American Civil
Liberties Union, Greater
Pittsburgh Chapter
237 Oakland Avenue
Pittsburgh, Pa. 15213

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HILARY SPATZ LEVINE, MAX A. LEVINE and MALIK TUNADOR

Plaintiffs

v.

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania and the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania,

Defendants

Civil Action No.

APPLICATION FOR A TEMPORARY RESTRAINING ORDER

Plaintiffs, by their counsel, request this court, upon the Complaint and Affidavits which have been filed in the instant action, to enter a Temporary Restraining Order enjoining Defendants, their officers, agents and employees from engaging in the following conduct:

1. Displaying, maintaining, storing or erecting the creche and/or menorah at issue herein, on County or City property on the grounds that immediate and irreparable loss, damage and injury will result to Plaintiffs prior to a full adversarial hearing.

2. Expending public resources in any manner or permitting the display and maintenance of the creche and/or

menorah at issue pending further order of court on the grounds that immediate and irreparable loss, damage and injury will result to Plaintiffs prior to a full adversarial hearing.

WHEREFORE, Plaintiff's request the entry of a temporary restraining order enjoining Defendants from displaying, erecting, maintaining or storing a creche and/or menorah on the grounds of the Allegheny County Courthouse or the City-County Building.

Respectfully submitted,
On Behalf Of American Civil
Liberties Union, Greater
Pittsburgh Chapter
237 Oakland Avenue
Pittsburgh, Pa. 15213

.....

James B. Lieber, Esq.
American Civil Liberties Union
237 Oakland Avenue
Pittsburgh, Pa. 15213

.....

Roslyn M. Litman, Esq.
1701 Grant Bldg.
Pittsburgh, Pa. 15219

.....

Jon Pushinsky, Esq.
1808 Law & Finance Bldg.
Pittsburgh, Pa. 15219

.....

Professor Richard Seeburger
University of Pittsburgh
School of Law
Pittsburgh, Pa. 15260

United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER, et al.,

Plaintiffs

v.

COUNTY OF ALLEGHENY, a political subdivision of the COMMONWEALTH OF PENNSYLVANIA. et al.,

Defendants

Civil Action No.

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF ALLEGHENY } ss:

MARK N. STAITMAN, being of full age, and duly sworn upon his oath, deposes and states, as follows:

1. I am an ordained Rabbi, having been ordained in 1975, and having prior to that earned a Bachelor of Arts degree in Sociology and Philosophy from the California State University at Northridge in 1970, and a Master of Arts in Hebrew Letters from the Hebrew Union College in Los Angeles, California in 1973.

2. I am an Associate Rabbi of Rodef Shalom Congregation located at 5th and Morewood Avenues in the City of Pittsburgh, Allegheny County, Pennsylvania, and I have served there as Spirtual Leader since June, 1975.

3. Rodef Shalom Congregation is the largest Jewish Congregation in the Commonwealth of Pennsylvania.

4. The Chanukhah menorah is a symbol of the religious holiday of Chanukhah.

5. Judiasm considers the Lighting of the Chanukhah menorah to be a religious act.

6. The Chanukhah menorah is viewed by most people as the sole, tangible symbol of the holiday of Chanukhah.

7. Most people, including many Jews, would regard a Chanukhah menorah as a religious symbol and, indeed, it is generally regarded as a religious symbol.

/s/ MARK N. STAITMAN
Mark N. Staitman

SWORN to and SUBSCRIBED before me
this 10th day of December 1986.

/s/ DEBORAH M. LENART
Notary Public

DEBORAH M. LENART, Notary Public
Munhall, Allegheny Co., PA
My Commisson Expires May 22, 1989

AFFIDAVIT OF ELLEN M. DOYLE

ELLEN M. DOYLE, having been duly sworn, deposes and states the following:

1. I reside at 4345 Schenley Farms Terrace in Pittsburgh, Pennsylvania, and I am employed as a lawyer at 508 Law & Finance Building, Pittsburgh, Pennsylvania.

2. I am the Chairperson of the Greater Pittsburgh Chapter of the American Civil Liberties Union ["ACLU"]. The ACLU receives numerous complaints each year about the display of religious symbols in our government buildings.

3. By letters dated November 13, 1986, I wrote to the Allegheny County Commissioners and to the Mayor of the City of Pittsburgh on behalf of the ACLU, requesting that the County and the City refrain from erecting religious symbols, including a creche and a menorah, in the City-County Building and in the Courthouse.

4. On November 26, 1986, and on December 2, 1986, I walked through the Allegheny County Courthouse and observed the nativity scene which is prominently displayed on the steps leading from the main Grant Street entrance to the first floor of the building.

5. The nativity scene has twenty or more figurines, including the Christ child, Mary, Joseph, the three kings, and an angel overhead, in or near a wooden manger with a log fence barrier. The fence is approximately 9 feet long and consumes more than half of the width of the broad staircase. The angel figurine is holding a banner which states "Gloria in Excelsis Deo." Between the manger scene and the log fence barrier is a sign which states "This Display Donated By The Holy Name Society".

6. There were no other decorations erected near the nativity scene on November 26, 1986 or on December 2,

1986, but there was a podium and a loudspeaker on the latter date and in prior years there have been some poinsettas and an organ located near the nativity scene at which Christmas carol concerts were performed.

7. On December 2, 1986, a group of approximately 60 high school students who were in the Courthouse waiting to visit the courts were massed around the nativity scene. I was very disturbed that the students would be in the Courthouse to observe our legal system at work and, instead of learning about the Constitutional prohibition against the establishment of religion, would view the erection of a nativity scene by the local political authorities.

8. When I grew up, our family had a very beautiful nativity scene which we erected in a place of prominence in our living room. On Christmas eve, we would gather around the nativity scene and read the Gospel Christmas story. During the Christmas season, we would also visit a number of the more beautiful nativity scene in the area.

9. In my own home today we have a small nativity scene which we place on the mantle in our living room. My husband and I also have begun the tradition of reading the Christmas story to our children on Christmas eve.

10. I believe that Christmas has religious significance and that the nativity scene represents for many persons, the portrayal of significant religious views which do not represent or are antithetical to their own.

11. In my childhood I was not permitted by my church or my family to participate in the religious ceremonies of persons of other faiths. For example, I would not participate in the lighting of the menorah during the Hannukah celebrations of my Jewish friends because I believed that to do so was inconsistent with my own religion.

12. Because of my early religious training, I am still uncomfortable participating in the religious ceremonies of others, and I am particularly sensitive to the imposition of other persons' religious customs and observances on both myself and others.

/s/ ELLEN M. DOYLE
Ellen M. Doyle

SWORN to and SUBSCRIBED before me
this 10th day of December 1986.

/s/ GERALDINE B. HUNTER
Notary Public

GERALDINE B. HUNTER, Notary Public
Pittsburgh, Allegheny County
My Commisson Expires August 13, 1990
Member, Pennsylvania Association of Notaries

AFFIDAVIT OF HILARY SPATZ LEVINE

I, Hilary Spatz Levine, having been duly sworn according to law, do hereby aver as follows:

1. I am a resident of the City of Pittsburgh, County of Allegheny.

2. I am a lawyer engaged in the private practice of law in Allegheny County.

3. As a practicing attorney, I am required to appear in the Allegheny County Courthouse and/or City-County Building several times a week.

4. Over the past few years, I have observed the nativity scene at the Courthouse each December.

5. I am a member of the Jewish faith and the display of religious symbols, particularly the nativity scene at the Courthouse, leaves me both angered and upset.

6. As I view the nativity scene to be a basic symbol of a religious group to which I do not belong, the government's display of that symbol indicates that the government, itself, adopts that religious symbol as its own.

7. Since I do not embrace the symbol of the nativity scene displayed by the government at the Courthouse, I feel that the government is engaging in a practice which conveys a message to non-christians that they are materially different from the majority.

8. I feel it is inappropriate and offensive for any governmental entity to adopt any religious symbol, and as that act represents participation by government in religious affairs of its citizens which are to be protected from sup-

port or interference by the state, I believe that the display of the menorah is likewise objectionable.

/s/ HILARY SPATZ LEVINE
Hilary Spatz Levine

SWORN to and SUBSCRIBED before me
this 10th day of December 1986.

/s/ GERALDINE B. HUNTER
Notary Public

GERALDINE B. HUNTER, Notary Public
Pittsburgh, Allegheny County
My Commisson Expires August 13, 1990
Member, Pennsylvania Association of Notaries

AFFIDAVIT OF MAX A. LEVINE

I, Max A. Levine, having been duly sworn according to law, do hereby aver as follows:

1. I am a resident of the City of Pittsburgh, County of Allegheny.

2. I am a lawyer engaged in the private practice of law in Allegheny County.

3. As a practicing attorney, I am required to appear in the Allegheny County Courthouse and/or City-County Building several times a week.

4. Over the past few years, I have observed the nativity scene at the courthouse each December.

5. I consider myself to be a member of the Jewish faith and the display of religious symbols, particularly the nativity scene at the Courthouse, leave me both angered and upset.

6. As I view the nativity scene to be a basic symbol of a religious group to which I do not belong, the government's display of that symbol indicates that the government, itself, adopts that religious symbol as its own.

7. I feel it is inappropriate and offensive for any governmental entity to adopt any religious symbol, and as that act represents participation by government in religious affairs of its citizens which are to be protected from sup-

port or interference by the state, I believe that the display of the menorah is likewise objectionable.

/s/ MAX A. LEVINE
Max A. Levine

SWORN to and SUBSCRIBED before me
this 10th day of December 1986.

/s/ GERALDINE B. HUNTER
Notary Public

GERALDINE B. HUNTER, Notary Public
Pittsburgh, Allegheny County
My Commisson Expires August 13, 1990
Member, Pennsylvania Association of Notaries

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HOWARD ELBLING, HILARY SPATZ LEVINE, MAX A. LEVINE and MALIK TUNADOR,
Plaintiffs

v.

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania and the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania.
Defendants

Civil Action No. 86-2617

MOTION TO DISMISS

The Defendant, City of Pittsburgh, files the following Motion to Dismiss Plaintiffs' Complaint pursuant to Fed.R.Civ.P. 12(b)(6) for the following reasons:

1. The Complaint fails to state a claim upon which relief can be granted.

2. The Complaint fails to state a cause of action.

3. The allegations of Plaintiffs' Complaint taken together with evidence adduced at the hearing on Plaintiffs' Motion For Preliminary Injunction demonstrate conclusively that the Complaint does not state a claim upon

which relief can be granted nor does the Complaint state a cause of action.

CITY OF PITTSBURGH

By: .....
George R. Specter
Deputy City Solicitor

.....
D. R. Pellegrini
City Solicitor

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HILARY SPATZ LEVINE, MAX A. LEVINE and MALIK TUNADOR,
Plaintiffs

v.

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania and the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania,
Defendants

Civil Action No. 86-2617

MOTION OF CHABAD TO INTERVENE AND TO ADDUCE LIMITED EVIDENCE

Pursuant to Rule 24(a) and (b) of the Federal Rules of Civil Procedure and Rule 29 of the Rules of Court of the United States District Court for the Western District of Pennsylvania, CHABAD hereby respectfully moves to be permitted to intervene as a party to this proceeding and to participate in this lawsuit as fully as if it had originally been named as a defendant by the plaintiffs, in support of which it avers as follows:

1. CHABAD has an interest in the subject matter in litigation, i.e., the "menorah" and the display thereof.

2. Disposition of the action may impair or impede its ability to protect that interest.

3. CHABAD's interest is not adequately represented by the existing parties.

4. Intervention would be in the public interest and would contribute to the fair and impartial administration of justice.

5. CHABAD is the owner of the menorah in question and for approximately the past five years has sought and received permission from the City of Pittsburgh to display this menorah on the steps of the City-County Building. Plaintiffs' request for an injunction against the City to prevent the display of this menorah, interferes with CHABAD's right of free speech and constitutional right to display the menorah on the City steps, and impairs and injures its ability to protect that right if denied the right to participate in this suit.

6. Denial of CHABAD's Motion to Intervene in this case, which is expected to be appealed by Plaintiffs, could foreclose CHABAD from displaying menorahs on public property throughout the United States. CHABAD currently participates in such displays of its menorahs in numerous cities throughout the United States, including a large menorah display in Lafayette Park across from the White House in Washington, DC.

7. CHABAD and the City's interests are not identical. The City's purpose in displaying the menorah is as part of an overall seasonal display. It defends on grounds that it is not, as alleged by Plaintiffs, violating the establishment clause of the Constitution. Although CHABAD would also defend on these grounds, it further contends that any ruling in favor of Plaintiffs would interfere with CHABAD's constitutional right of free speech. Denial of the motion would foreclose CHABAD from effectively asserting this claim. Filing an amicus curiae brief does not adequately protect these rights, if the record, as here, is not complete.

8. This Motion to Intervene is timely and all parties have been served with a copy of this Motion.[1] The action herein was filed late in the day of December 10, 1986, and the hearing date was set by order of the court dated Thursday, December 11, 1986. The hearing was scheduled for Monday, December 15, 1986. On December 11, 1986, the undersigned was asked by CHABAD for legal aid. Inasmuch as the undersigned is an employee of the Federal Government, he is not permitted to represent private parties without the express approval of the General Counsel of his Federal Agency, the National Labor Relations Boards. Such approval could not be secured by the time of the hearing. Moreover, counsel was out of town from early in the morning of December 12, 1986, to late in the day of December 14, 1986. Counsel did appear as a spectator and friend of CHABAD at the preliminary injunction hearing on December 15, 1986. However, when it became obvious to the undersigned and the CHABAD representative that intervention was a necessity, the undersigned orally moved on behalf of CHABAD for intervention, albeit at some personal risk to the undersigned's job. The District Court denied the motion at such time on the basis that the parties had not been served with a copy of the Motion and that it was untimely to intervene in the hearing on the preliminary injunction during such time that the hearing had already commenced. The instant motion for intervention is made with respect to the permanent injunction.[2] As will

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[1]In the event that the court wishes CHABAD to file an Answer to the Complaint, CHABAD will do so.

[2]The instant motion would have been filed even prior to this time, but CHABAD was not informed as to the parties' request to close the hearing and forego adducing any further evidence and plaintiffs' apparent desire to appeal, until January 12, 1987. Thus, prior to such time, there was, as a practical matter, nothing to "intervene in", because there was no indication that plaintiffs intended to pursue the case further than the preliminary injunction hearing. Only after plaintiffs, defendents, or the Court would thereafter take some action, would there be any need to intervene.

be set forth in the forthcoming brief, such motion, having been filed within slightly more than one month after the filing of the Complaint and prior to a hearing on the merits of the Complaint itself, is clearly timely, especially when the practical circumstances are considered.[3] Therefore, those reasons advanced by the Court for not permitting CHABAD to intervene in the middle of the preliminary injunction hearing do not apply to the instant Motion.

9. CHABAD has already been prejudiced by being denied its earlier request to intervene in that it was unable to cross-examine witnesses at the preliminary injunction hearing who gave inaccurate and/or misleading testimony to the Court. Nor was CHABAD able to adduce relevant evidence as to the nature of the object being displayed. CHABAD was not informed until January 12, 1987, that the parties had asked the court at a conference of counsel on January 8, 1987, to close the record. This request of the court was made despite the knowledge of counsel for the City that CHABAD strenuously opposes the closing of the record at this time.[4] Neither was CHABAD informed of the City's Motion to Dismiss filed on or about December 30, 1986, nor of the January 7, 1987, Order of the Court for

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[3]On January 5, 1987, counsel for CHABAD received permission from the General Counsel of the National Labor Relations Board to represent CHABAD in the status of a private citizen, not as a representative of the Board. Accordingly, counsel for CHABAD wishes to stress that any views stated by counsel for CHABAD are not those of the Federal Government or the National Labor Relations Board and that he is participating on a pro bono basis and in the status of a private citizen, and not as a Federal or Board employee.

[4]Counsel for Chabad does not mean to in any way be critical of counsel for the City, or the City itself, but merely cites the above as evidence that the interests of Chabad are not identical to those of the City and that there is a strong potential of prejudice if Chabad is not permitted to intervene.

the Filing of Briefs on the City's Motion to Dismiss. Furthermore, CHABAD was not present at the aforementioned conference of counsel before the Court in which the Court encouraged the parties to resolve the matters before it, including the display of our menorah. CHABAD is a necessary party to these proceedings and a denial of CHABAD's motion could lead to a court decision or a non-court settlement contrary to CHABAD's interests.

10. The instant case involves important constitutional issues and has national implications. Because of CHABAD's particular expertise, it has a special ability to bring before the court evidence relating to the part-secular, part-religious nature of the menorah, which will have an important bearing on the legal issues which Plaintiffs have placed and will place before this and appellate courts. In this connection, CHABAD seeks to adduce evidence, as set forth in the attached declaration, as to the nature of the object it seeks to display. Plaintiffs obviously and correctly deem the nature of the object to be critical to this proceeding, as evidenced by its Complaint, Memorandum, and evidence presented at the preliminary injunction hearing.

11. It is requested that this court receive this Declaration into evidence, as well as pictures of the menorah display which are now in the possession of the City. As an alternative to admitting the Declaration into evidence, it is requested that the court reopen the prior hearing, or conduct a hearing on the Complaint with respect to the request for a permanent injunction, for the limited purpose of admitting the testimony of the declarant of the Declaration, subject to cross-examination.

12. The evidence set forth in the Declaration is critical to the issues before this court and all reviewing courts. If not permitted, then this court and all reviewing courts will not have an adequate description of the menorah in question.

13. No party would be prejudiced in any way by the granting of this Motion and the hearing would not be unduly delayed by the granting thereof. To the contrary, because of the considerable public interest, a full and complete record is in the best interest of the parties, the public, and the administration of justice. There would be no delay to these proceedings whatsoever if the attached Declaration if permitted to be introduced into evidence. If the attached Declaration is not permitted to be introduced into evidence, then the undersigned would estimate the direct examination needed to adduce such evidence to be 15 minutes to one-half hour.

14. It is further noted that CHABAD was permitted to intervene in a similar proceeding before the Superior Court of the State of California for the County of Los Angeles. Although this was before a state and not a federal court, similar issues were before the state court. A copy of the application to intervene, and Order Granting Leave to Intervene are attached hereto.

WHEREFORE, Counsel for CHABAD respectfully requests that the Court grant the instant Motion.

Dated at Pittsburgh, Pennsylvania, this 16th day of January 1987.

/s/ CHARLES H. SAUL

CHARLES H. SAUL, ESQUIRE
Counsel for CHABAD
5808 Northumberland Street
Pittsburgh, PA 15217

DECLARATION OF RABBI YISROEL ROSENFELD

I, RABBI YISROEL ROSENFELD, declare:

1. I am an ordained Orthodox Jewish rabbi. I have personal knowledge of the facts set forth in this Declaration, and if called as a witness could and would testify competently thereto.

2. My expertise in matters of Judaism, Jewish law and Jewish ritual and customs is based in part on the following:

a. In 1975, I received my ordination (Smicha) from the Central Yeshiva, Tomshei Tmimim Lubavitz of the United States of America.

b. In 1977, I received a special Ordination (Smicha Yudin Yudin), which permits me to serve on a rabbinic court and render Jewish legal decisions. Such ordination was from one of the foremost Jewish authorities in the world and is the highest ordination that is available in Jewish law.

c. I have authored and published several responsa on difficult areas of Jewish law (a "Responsum" is an inquiry, directed to a rabbi of reputed expertise in matters of Jewish law, concerning technical or problematic interpretations and applications of Jewish law.).

d. Since 1975, I have taught and lectured on Jewish law and customs at numerous Jewish institutions of higher learning, including an Orthodox rabbinic college. Most recently, since about 1980, I have served as principal of Yeshiva Achei Tmimin, a Jewish day-school (parochial school), which teaches Judaica to students from pre-school through high school.

e. In addition to teaching Jewish law and customs at Yeshiva Achei Tmimin, I have lectured extensively and

taught adult Jewish educational courses at synagogues and other Jewish institutions of higher learning.

f. I serve as a rabbinic legal consultant to members of the Jewish community of Pittsburgh, Pennsylvania.

LACK OF RELIGIOUS SIGNIFICANCE OF PUBLIC MENORAH DISPLAYS

3. It is incorrect, as alleged by plaintiffs, to construe the menorah as a "purely religious symbol" (p. 7 of Plaintiff's Memorandum). It is incorrect, as alleged by plaintiffs, to conclude that the menorah "simply has no secular use or significance" (p. 8 of Plaintiff's Memorandum). Furthermore, it is incorrect, as alleged by Plaintiffs, to construe the menorah as a purely sectarian object. Based upon my knowledge and understanding of Jewish law, I conclude that these claims of plaintiffs are not true.

4. I am familiar with the laws and procedures for lighting Chanukah Menorahs. All of the laws and procedures in Jewish law regarding the Chanukah Menorah pertain *solely* to an individual's own Chanukah lighting done in the privacy of his or her own home.

5. Jewish law prescribes no requirement, commandment, rite or ritual pertaining to lighting a Chanukah Menorah in a public place. It is not considered sinful or improper or a ritual omission to fail to light a Chanukah Menorah in a public place.

6. The only requirements of Jewish law pertaining to the lighting of a Chanukah Menorah deal with lightings in the home. The following example makes this clear: there has evolved a *custom* in some Jewish communities of lighting a Chanukah menorah in the synagogue. However, even if one attends a public Chanukah lighting in a synagogue, one is still obligated to light a Menorah at home, since the public lighting does not constitute a religious

ceremony, nor does it fulfill any religious obligation. The ritual obligation of lighting Chanukah candles is only fulfilled by the candlelighting at one's home.

7. In other Jewish communities, there has *not* evolved a custom of lighting a Chanukah menorah in the synagogue. This failure to light the Menorah in the synagogue does not violate any rule or principle of Jewish law.

8. Therefore, in my opinion, the lighting of a Chanukah menorah in a public forum such as the steps of the City-County Building does not constitute a "religious" act. What is important to the Jewish faith is the lighting of menorahs at home.

9. Chanukah celebrates historical facts as well as religious events. One principal significance of Chanukah is that it recalls the Maccabees' rebellion against the Hellenists. The story of that rebellion teaches the universal messages that the weak can conquer the mighty and the few can conquer the many when they stand up for truth and religious freedom. Chanukah also teaches a message of the victory of individual rights against tyranny and dictatorship. These messages are similar to American concepts of political rights.

10. The publicly displayed Menorah, separated from the ritual of lighting in the home, connotes more strongly the historical, political and cultural significance of Chanukah, rather than its religious significance. To the extent Chanukah celebrates the historical events surrounding the Jewish people winning political freedom from their Hellenist oppressors, Chanukah is analogous to the Fourth of July, which celebrates political freedom.

11. The only religious aspect of the menorah is not the object itself, but rather the act of lighting it in one's *home*. The menorah's only religious function comes into play when it is lit in the home. Even when lit in a synagogue,

the significance of the menorah is only to remind us of the historical events of Chanukah. In a public place, outside of a synagogue, the lights have significance only as a seasonal display.

12. In my opinion, a public display of a menorah on the steps of the City-County Building is a display of seasonal goodwill and a reminder of historical and political events, rather than a devotional religious exercise. It is an appropriate way for Jews to participate in a seasonal display with our Christian friends, next to whose Christmas tree the menorah stands.

COMPARISON WITH CHRISTIAN SYMBOLS

13. The menorah is not a symbol of the Jewish religion in the sense that the cross is a symbol of the Christian faith.

14. The menorah is not analogous to a creche. The creche depicts a baby which Christians view as the Son of G-d. The menorah depicts no deity, is not worshipped, and, as described above, has no religious significance when placed outside the home.

15. If, for purposes of legal analysis, one were to compare a menorah to a Christian object, it would more closely be analogous to a Christian tree. By its very name, the Christmas tree draws attention to a Christian religious holiday. However, in addition to whatever religious significance it may have, it also serves as a symbol of seasonal goodwill—much in the same way, as described above, that the menorah does. In addition, many Christians who are not otherwise religious may display Christmas trees in their homes at the holiday season as a focus of family togetherness, as a place to exchange gifts, and to emphasize the feeling of goodwill and rejoicing. Similarly, many Jews who are not otherwise religious display menorahs at the holiday season and light candles in them for the very same

reasons. Both the menorah and the Christmas tree are stimulants to the improvement of human nature toward the goal of peace on earth and goodwill among all.

16. In the Jewish religion, truly sacred religious objects are distinguished by careful, elaborate rules governing their creation and disposal.

17. The treatment of Torah scrolls provides the most straightforward example of this. The Jewish religion has careful rules governing the materials from which Torah scrolls may be made, including the particular kinds of parchment used. In addition, a Torah, once it wears out, may not be disposed of in a haphazard fashion or by simply discarding it. The worn out Torah must be buried according to a particular ceremony. Similar rules govern T'fillin (phylacteries), Mezzuzot (Torah passages on small parchments, affixed to doorways), Tzizit (fringes worn on clothing) and many other sacred objects.

18. Chanukah menorahs are not treated in the same way. There are no required materials from which a menorah must be made. A perfectly acceptable menorah can be fashioned from any materials, including whiskey shot glasses or bottle caps. Additionally, there are no limitations on what can be done with a Chanukah menorah which wears out, or which its owner simply wishes to replace. It can simply be thrown away. Such a menorah can be melted down (if metal) and used for other things. There are no restrictions governing the disposal of a menorah as there are for Torah scrolls or other sacred writings or objects.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration is executed on this 16th day of January 1987 at Pittsburgh, Pennsylvania.

/s/ RABBI YISROEL ROSENFELD
Rabbi Yisroel Rosenfeld

SUBSCRIBED and SWORN to in my presence
this 16th day of January, 1987.

/s/ ALICE J. JONES
Notary Public

ALICE J. JONES, Notary Public
Pittsburgh, Allegheny County
My Commisson Expires April 19, 1990
Member, Pennsylvania Association of Notaries

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HILARY SPATZ LEVINE, MAX A. LEVINE and MALIK TUNADOR,
Plaintiffs

v.

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania and the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania,
Defendants

CHABAD
Intervenor

Civil Action No. 86-2617

MOTION TO DISMISS

CHABAD hereby files this Motion to Dismiss Plaintiffs' Complaint, as amended, pursuant to Fed.R.Civ.P. 12(b)(6), for the following reasons:

1. The Complaint, as amended, fails to state a claim upon which relief can be granted.

2. The Complaint, as amended, fails to state a cause of action.

3. The allegations of Plaintiffs' Complaint, as amended, taken together with evidence adduced at the hearing on Plaintiffs' Motion for Preliminary Injunction and the Declaration offered by Intervenor, demonstrate

conclusively that the Complaint, as amended, does not state a claim upon which relief can be granted nor does the Complaint, as amended, state a cause of action.

Dated this 22nd day of January 1987 at Pittsburgh, Pennsylvania.

.....

CHARLES H. SAUL,
COUNSEL FOR CHABAD
5808 Northumberland Street
Pittsburgh, PA 15217
(412) 521-5778

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HILARY SPATZ LEVINE, MAX A. LEVINE and MALIK TUNADOR,
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Defendants

Civil Action No. 86-2617

RESPONSE OF PLAINTIFFS REPRESENTED BY THE AMERICAN CIVIL LIBERTIES UNION IN OPPOSITION TO THE MOTION TO INTERVENE AND ADDUCE LIMITED TESTIMONY BY CHABAD

Plaintiffs American Civil Liberties Union, Ellen Doyle, Michael Antol, Wendy L. Colby and Max Levine, respond to the motion of CHABAD to intervene and adduce limited evidence as follows:

1. Denied as a conclusion of law to which no responsive pleading is required. However, it is admitted that CHABAD has an ownership interest in the menorah. It is further denied that CHABAD has cognizable interest in displaying the menorah on the City-County Building steps which are not a traditional public forum.

2. Denied as a conclusion of law. It is further denied that any ownership interest in the menorah or protected right of CHABAD will be impeded or impaired.

3. Denied. Any interest which CHABAD has within the scope of this litigation has been adequately and faithfully protected by the Defendant City of Pittsburgh.

4. Denied. Intervention would not be in the public interest in that it needlessly would delay and complicate the proceedings. It would not result in the fair and impartial administration of justice in that it would re-direct the litigation belatedly in a manner not prepared, framed, tried or argued by the original parties who had sought a just resolution on a narrow question of law and fact pertaining to an alleged unconstitutional establishment.

5. It is admitted that CHABAD is the owner of the menorah and has received permission from the City to display it on the steps of the City-County Building. Otherwise, this paragraph is denied as containing conclusions of law to which no response is required.

In addition, it is specifically denied that CHABAD has a constitutional right to display the menorah on the City-County Building steps, which are not a traditional public forum and which violates the establishment clause.

6. It is denied that denial of the Motion of Intervene could "foreclose CHABAD from displaying menorahs on public property throughtout the United States," as this is a conclusion of law to which no responsive pleading is required. However, it is additionally denied, because this suit does not address religious displays on such public property as parks, streets, sidewalks and other traditional public fora, but only the government headquarter properties of the Defendants herein. Plaintiffs are without knowledge or information sufficient to form a belief as to the

averment regarding other displays by CHABAD are beyond the scope of this case.

7. All the averments in this paragraph are denied as conclusions of law to which no responsive pleadings are required. Further, it is denied that CHABAD's interests are not sufficiently akin to the Defendant City of Pittsburgh. CHABAD, for approximately five years, has sought and recieved the City's permission to display the menorah on the steps in front of the City-County Building. The City defended against the imposition of a preliminary injunction in order to afford the same permission to CHABAD as in previous years, and indeed gave CHABAD permission, after the denial of the preliminary injunction, thus allowing the menorah to be displayed. The City likewise has accommodated CHABAD by storing the menorah as in previous years. As set forth above, it is denied that CHABAD hs a free speech and exercise right to display on the pertinent steps, which are not a public forum. It is further denied that denial of intervention herein bars CHABAD from asserting its putative claim if and when justiciable, in another forum, though it denied that the claim is colorable. It is specifically denied that the record is not complete in that all parties to the action have stipulated that the record is complete. It is denied that an *amicus* brief would not be sufficient. Further, an *amicus* brief would be less burdensome and more conducive to judicial economy.

8. It is denied that the Motion to Intervene is timely. Plaintiffs are without information or belief as to the truth of Mr. Saul's averments regarding his schedule, travel and federal agency dilemmas. However, it is denied that these are material, because CHABAD, rather than Mr. Saul, is the would-be intervenor, CHABAD learned of the pending hearing on December 11, 1986, four days in advance and has put forth no reason why it could not have retained

other counsel in the interim or appeared *pro se*.. In addition, Mr. Saul had access to Plaintiffs' documents and attorneys when the suit was filed and knew or should have known that it involved an establishment clause challenge to the placement of the menorah. It is further denied that the instant written motion for intervention is timely, in that it was filed over a month after the denial of the oral motion and the judgment from the bench denying intervention on December 15, 1986. If CHABAD wished the Court to reconsider the Court's initial decision on intervention, it had an obligation to file a motion to alter or amend or reconsider within ten days pursuant to Fed. R.Civ. P. 59(e).

9. It is denied that CHABAD was prejudiced by the conduct of the preliminary injunction and that CHABAD was a necessary party, because the Defendant City adequately and faithfully represented the interests of citizens, including those in CHABAD. It is admitted that CHABAD has not been a party to conferences involving the parties. Otherwise, Plaintiffs are without knowledge or information sufficient to form beliefs regarding the averments in this paragraph, which are therefore denied. Further, Plaintiffs object to this paragraph as burdensome, confusing, indirect, unconcise and violative of Fed. R.Civ. P. 8(e).

10. It is admitted that this is an important constitutional case. It is denied that CHABAD has demonstrated particular expertise within the context of the litigation.

11. It is admitted that CHABAD has made requests to the Court. It is denied that these requests serve justice nor do more than delay the proceedings and burden and prejudice original parties.

12. It is denied that the evidence in the Declaration is critical. All parties herein have stipulated that the record is

complete, and the Court needs no other evidence or testimony to render a just decision on the merits.

13. It is denied that no party would be prejudiced by intervention. Plaintiffs who proceeded based on the Establishment Clause would have to re-brief and argue their case to rebut a free exercise and/or speech claim. The proceedings have already been subjected to considerable delay despite efforts of all parties to stipulate, narrow the issues, and close the record. A hearing including direct and cross-examination of the Declarant would be time consuming; further, Plaintiffs would seek to introduce rebuttal testimony, experts and treatise material as well as making additional argument. Plaintiffs submit that a hearing on the putative claim of intervenor's could take at least another court day. Preparation of arguments and briefs would add to already considerable expenditures of funds and time. In addition, other religious groups may seek to intervene if this motion is granted, thus further complicating and delaying the proceedings.

14. Denied as a legal conclusion to which no responsive pleading is required.

WHEREFORE, Plaintiffs respectfully request that the Court deny the Motion to Intervene.

Respectfully submitted,

.....

Roslyn M. Litman, Esquire

Jon Pushinsky, Esquire

James B. Lieber, Esquire
Counsel for Plaintiffs

on behalf of the American
Civil Liberties Union

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HOWARD ELBLING, HILARY SPATZ LEVINE, MAX A. LEVINE and MALIK TUNADOR,
Plaintiffs

v.

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania and the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania,
Defendants.

Civil Action No. 86-2617

ANSWER OF THE DEFENDANT, CITY OF PITTSBURGH, TO MOTION OF CHABAD TO INTERVENE AND TO ADDUCE LIMITED EVIDENCE

The defendant, City of Pittsburgh, files the following Answer to the Motion of Chabad to Intervene and to Adduce Limited Evidence:

1. Denied. To the contrary, Chabad's alleged interest is neither one protected in law or one which would constitute an interest under the relevant Rules, as the basic question herein is whether the City of Pittsburgh ("City") can erect the display at issue.

2. Denied. Disposition of the within action has no effect on Chabad as it has no interest herein.

3. Denied as Chabad has no interest in the subject matter of this litigation.

4. Denied for the reason set forth in Paragraphs 1-3 above.

5. It is admitted that Chabad is the owner of the Menorah in question. The implications of the remainder of Paragraph 5 are denied as the City has permitted erection of the Menorah solely as part of an overall seasonal display. Such display is solely at the discretion of the City, and Chabad has no right in law to display the Menorah. Further, the City-County Building is not a public forum and neither Chabad nor any other person or entity has any right to make any display therein or thereon.

6. Denied. If Chabad is not a party in this action no decision herein could adversely affect its rights.

7. Denied. Chabad has no interest in the within litigation and accordingly comparison of its interest with the City's is irrelevant and academic. For the reasons set forth in Paragraph 5 above, Chabad has no right which is at issue herein.

8. The City does not contest the timeliness of the Motion to Intervene.

9. Denied. Is further alleged that Chabad has suffered no prejudice as it has no interest in the within proceedings. Chabad's lack of knowledge of post-preliminary injunction proceedings are irrelevant as Chabad is not a party, has no right to participate as such or to be informed of any such proceedings or to receive such notices as are required by rules of Court to be given to parties.

10. The allegations of Paragraph 10 are irrelevant as Chabad has no interest in this case. Accordingly, such expertise as Chabad may have is irrelevant and academic.

11. Counsel for the City has requested that Counsel for Plaintiffs agree to make the subject pictures part of the record. The City has no objection to admitting Chabad's Declaration into evidence so long as Chabad does not become a party herein.

12. It is denied that the Declaration is critical to the issues herein, but the City has no objection to admitting the Declaration into evidence so long as Chabad does not become a party.

13. Denied. The City would be prejudiced by grant of the Motion to Intervene because Chabad has no interest herein, and seeks to assert rights not at issue and not necessary to a fair and complete determination of the case.

14. The intervention of Chabad in a state proceeding in the State of California is irrelevant here. Further, the Order of the Superior Court of California does not set forth any reason in law for the intervention there permitted and accordingly constitutes no precedent herein.

FIRST AFFIRMATIVE DEFENSE

Chabad seeks to inject as an issue in this case its alleged right of free speech under the First Amendment which is not now an issue herein.

SECOND AFFIRMATIVE DEFENSE

Chabad's intervention would require introduction of evidence regarding the alleged rights of all members of the public who seek to utilize the City-County Building for displays, none of which evidence is necessary for a determination of the issues pending presently among the parties. Such collateral issue and evidence relating thereto

would protract unnecessarily the existing case and impose upon the present parties excessive costs neither required nor warranted by existing issues.

THIRD AFFIRMATIVE DEFENSE

The basic issue between the parties is whether the City's display violates the Establishment Clause of the First Amendment and the City can adequately represent any party supporting the validity of such display.

FOURTH AFFIRMATIVE DEFENSE

Chabad's interest in the case is no different than that of any person or entity supporting the City's position.

FIFTH AFFIRMATIVE DEFENSE

Chabad can by leave of Court file an amicus curiae brief and thus advocate its position on the issues pending in the case.

WHEREFORE, the Motion of Chabad to Intervene and to Adduce Limited Evidence should be denied.

CITY OF PITTSBURGH

By: /s/ GEORGE R. SPECTER
George R. Specter
Deputy City Solicitor

/s/ D. R. PELLEGRINI
D. R. Pellegrini
City Solicitor

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HOWARD ELBLING, HILARY SPATZ LEVINE, MAX A. LEVINE and MALIK TUNADOR,
Plaintiffs,

v.

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania and the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania,
Defendants

Civil Action No. 86-2617

STIPULATION

It is hereby stipulated that the Menorah was taken down on Tuesday, January 13, 1987 by City employees and placed in storage on City premises.

/s/ ROSLYN M. LITMAN
Counsel for Plaintiffs
American Civil Liberties Union
Greater Pittsburgh Chapter,
Ellen Doyle, Michael Antol,
Reverend Wendy Colby,
Howard Elbling, Hilary Spatz
Levine and Max A. Levine

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HOWARD ELBLING, HILARY SPATZ LEVINE, MAX A. LEVINE and MALIK TUNADOR,

Plaintiffs,

v.

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania and the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania,

Defendants

Civil Action No. 86-2617

STIPULATION

It is hereby stipulated that the Nativity Scene was taken down by Father Yurko on Friday, January 9, 1987 and stored as heretofore in the basement of the County Court House.

/s/ ROSLYN M. LITMAN

Counsel for Plaintiffs
American Civil Liberties Union
Greater Pittsburgh Chapter,
Ellen Doyle, Michael Antol,
Reverend Wendy Colby,
Howard Elbling, Hilary Spatz
Levine and Max A. Levine

In The

United States District Court

For The Western District of Pennsylvania

AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HOWARD ELBLING, HILARY SPATZ LEVINE, MAX A. LEVINE and MALIK TUNADOR,

Plaintiffs,

v.

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania and the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania,

Defendants

Civil Action No. 86-2617

STIPULATION

The parties hereto agree that the record in this case shall be considered to be complete and shall serve as the record for the purposes of the Court's ruling on the plaintiffs' request for a permanent injunction and other relief.

/s/ Roslyn M. Litman

Counsel for Plaintiffs
American Civil Liberties Union
Greater Pittsburgh Chapter,
Ellen Doyle, Michael Antol,
Reverend Wendy Colby,
Howard Elbling, Hilary Spatz
Levine and Max A. Levine

In The

United States District Court

For The Western District of Pennsylvania

AMERICAN CIVIL LIBERTIES UNION, et al., *Plaintiffs*		**Civil Action**
v.		**86-2617**
COUNTY OF ALLEGHENY, et al., *Defendants*		

ORDER

AND NOW, March 16, 1987, the motion of Chabad to intervene and to adduce limited evidence is granted. A hearing is fixed for April 24, 1987, at 10:00 A.M. in Court Room No. 6 where the limited evidence may be presented.

/s/ Barron P. McCune

Barron P. McCune
SENIOR UNITED STATES
DISTRICT JUDGE

cc: Counsel of
record.

[2]

(Court convened at 10:40 a.m.)

THE COURT: Good morning, ladies and gentlemen. We're ready to proceed at 86-2617.

You may proceed, Ms. Litman.

MS. LITMAN: Your Honor, may I address the Court in a brief opening to outline what the plaintiff intends to prove?

THE COURT: Certainly.

MS. LITMAN: May it please Your Honor, as you know, the plaintiffs have brought this suit requesting the Court to enjoin the County of Allegheny from continuing to display the unadorned Nativity scene which sets as of now in the Allegheny County Courthouse, and to enjoin also the City of Pittsburgh from erecting, or permitted to be erected in front of the City-County Building on the steps a Hanukkah Menora, which it is the City's declared intention to do, because we believe that these actions violate the Establishment Clause of the United States Constitution.

We will prove, Your Honor, by our testimony here today, that the purpose of these Governmental bodies in displaying the Nativity Scene and the Menora is not secular. Furthermore, that the effect of the Nativity scene is to advance religion. Similary, that the effect of the Menora is to advance religion. And further, that the County on the one hand, and the City on the other are excessively entangled with the respective [3] religions whose religious symbols are involved. Namely, that of Christianity and that of Judaism.

As part of our proof, Your Honor, we will prove to you that the County of Allegheny owns the County Courthouse, which is the seat of County government in Allegheny County, and which houses a number of the Allegheny County Courts. In that respect, Your Honor, it is much like the building we are in here, the Federal Courthouse, which houses a number of the, which houses the Federal Courts of the Eastern District of Pennsylvania. And in that regard it is particularly significant, because we must remember, and we will show you, Your Honor, that with the County Courthouse many of the people who are there are there under compulsion of law. Some of those are, of course, criminal defendants, because, of course, the criminal courts are in the County Courthouse. Some of those are jurors who are required by law to attend the courts and to fulfill their responsibilities as citizens acting as jurors. Many of those are witnesses who are there under the compulsion of the subpoena power of the Allegheny Courts. So that that building, as this building, is a building which houses those courts and which requires the attendance of those people.

In addition, however, unlike this building, but making it even more the seat of County government, we will show you, Your Honor, that in the Allegheny County Courthouse there is the Office of the Commissioners of Allegheny County, there is [4] the Office of the Clerk of Courts, there are the courthouses, there are the courts for civil cases worth under less than $20,000. There is the Office of the County Controller, there is the Office of the County Treasurer, there is the Office of the Sheriff, and in addition, there are the offices for obtaining passports, among other offices, Your Honor.

We will prove to you, sir, that in late November there was erected on the main staircase of the Allegheny County Courthouse at about the first landing a Nativity scene. The

staircase being something at at other times of the year is used for the purpose of ingress and egress, it being the main staircase. We will prove to you, Your Honor, that the Nativity scene takes somewhere between one-half and two-thirds of the area provided by the staircase, and that the scene consists of a number of figures, traditional figures whose significance is found in the Christian Gospels, the Gospels of Luke and Matthew. And we will describe what the, witnesses will describe what these traditional figures are. They include, of course, the baby Jesus Christ, Mary, Joseph and the others who find their origins in the Gospels of Christianity.

In addition, Your Honor, in front of the Nativity scene, we will show, and we will introduce photographs so that Your Honor will be able to see, that there is a sign that reads "Donated by the Holy Name Society." And we will prove to [5] Your Honor, through the testimony of the witnesses, that the Holy Name Society is a Catholic society, and that its purpose is the veneration of the name of Jesus Christ. In addition to that sign, Your Honor, atop the manger in the Nativity scene in the courthouse there is an angel, and in that angel's hand there is a banner, and the banner reads, "Gloria In Excelsis Deo," in the Latin. The English translation being, Glory to God in the highest, which is a direct quotation from the Gospel of Luke, Chapter 2, Verse 14.

We will provide further, Your Honor, that in the past the City of Pittsburgh and the County of Allegheny have permitted to be displayed on the steps of the City-County Building a Hanukkah Menora. Now, the City-County Building is for the City, the counterpart of what the courthouse is for the County, because, indeed, in the City-County Building, as Your Honor knows, and as we will show, there is the, there are the courts of the County that are the Civil Courts. In addition to those courts, where

again people must come by compulsion, such as I enumerated with the County Courthouse, and such as we have here in the Federal Courts, they are again, the seat, the offices of the seat of City government, because we have the Mayor's Office, we have the City Council, we have the Prothonotary where all filings are done in the Civil Courts, we have the Marriage License Bureau where people must go if they wish to obtain a marriage license, we have the City [6] Treasurer's Office, we have the Pittsburgh Commission on Human Relations, we have the Allegheny County Bar Association, the Allegheny County Law Library, the Allegheny County, not only Court of Common Pleas, but the Orphans' Court, Your Honor, the Family Division, we have the Allegheny County Register or Wills, we have the Pennsylvania Supreme Court and its Prothonotary. We have the City of Pittsburgh Parks and Recreation. These, among others, Your Honor, are the offices which are at the seat of City government and County government, and to which the people of the community must go in carrying out the business of the City and the County with regard to those offices.

Now, there are a number of plaintiffs, Your Honor, each one of them is a taxpayer of Allegheny County. Many of them are also taxpayers of the City of Pittsburgh. They have all seen the Nativity scene, and those who are called to testify will described to Your Honor their reaction and why the Nativity scene in the courthouse is something which is offensive to them.

The plaintiff, Ellen Doyle, will testify. She, Your Honor, will testify that she is a resident of Allegheny County and the City of Pittsburgh and a taxpayer. She is a lawyer who practices in Allegheny County and whose practice brings her before the courts and into the County Courthouse and the City-County Building in connection with her work. [7] She is also the Chair at the present time

of the Greater Pittsburgh Chapter of the American Civil Liberties Union. She will testify, Your Honor, that she, indeed, has great respect for, reverence for and feeling for a Nativity scene or creche, and indeed, maintains one in her own home. But she will testify to the Court that with respect to the Nativity scene in the courthouse, that this is something which in her judgment is offense to the Constitution of the United States, and indeed, contravenes the requirements of the Establishment Clause of the First Amendment.

Reverend Wendy Colby, who is also a plaintiff, is a Unitarian minister, Your Honor.

There are several other plaintiffs who are lawyers, but there is one in particular whom I would like to point out to the Court, Mr. Elbling is not only a lawyer, but he is a law clerk whose offices are, whose Judge's chambers are in the Allegheny County Courthouse. He will testify that his work requires him to go to the courthouse where he must attend every working day, and that in doing that he sees the Nativity scene. He will testify that he is a, by religion, a member of the Jewish religion, and that the view of the Nativity scene carries for him the message that the County of Allegheny endorses Christianity, and that this is not his religion.

Plaintiff Malik Tunador, Your Honor, is a United States citizen, who is a naturalized citizen who has come to this [8] country from the country of Turkey. He will testify that he is a resident and a taxpayer of Allegheny County, and that he is a member of the Moslem faith. He will explain, Your Honor, that he has great feeling for and respect for all religions. In fact, he is an active member of the Western Pennslyvania Chapter of the National Conference of Christians and Jews, which has as one of its purposes the elimination of discrimination among all religions. But he will testify, Your Honor, that for him a view

of the Nativity scene is, indeed, an announcement, or has the meaning that his government, the County of Allegheny, endorses the religion of Christianity. He will explain to Your Honor that on a recent occasion when he went to the courthouse for the purpose of renewing his passport, and in viewing the Nativity scene, to him, this is something which his religion forbids. That is to day, the pictorialization of God in the Moslem faith, as he will explain to you, is something which is prohibited. So that pictures of, or statues of the concept of God in the Moslem faith is contrary to his religion. And that although he respects the rights of others, of Christians to have a Nativity scene, and although he has great feeling for and understanding of those religions, as the Moslem religion teaches him to have, and although he believes people should be free to have Nativity scenes in other places, that to him it is an inappropriate place to have it at the seat of [9] County government.

The plantiff will call, Your Honor, three experts. Father Greg Swiderski, who is a Catholic priest, who will testify, Your Honor, that he has seen the Nativity scene at the courthouse, and that, indeed, it is a religious symbol. Reverend Robert Brashear, a Presbyterian minister, who will testify that he has seen the Nativity scene. He will testify as to its meaning, and he will affirm also that it is a religious symbol.

Now, with respect to the case of the Menora, as the Court knows, the Menora has not yet been placed upon the steps this year. What we will prove, Your Honor, that the plaintiff, Ellen Doyle, as Chairperson of the American Civil Liberties Union, wrote the Mayor and pointed out to the Mayor that having a Menora on the steps of the City-County Building was violative of the requirements of the First Amendment and its preclusions against the government from establishing religion. She will testify further,

Your Honor, that the Mayor responded on behalf, he said of him and the County, and said that the, the governments involved intended this year to once again display the Menora. In that regard, your Honor, I have not said, but we will prove that the City and the County jointly own the City-County Building, and we will call a rabbi, Rabbi Mark Staitman, who is a clergyman of the Jewish faith here in the City of Pittsburgh, and he will testify, Your Honor, [10] that the Menora is a religious symbol.

In the course of the testimony of the experts, Your Honor, we will establish that the Nativity scene has no secular purpose. We will show Your Honor that it is erected this year, as in past years, only at the Christmas season. This, Your Honor, will basically be our case.

We will put in testimony that the County, during the year when the Nativity scene is not being displayed actually stores the Nativity scene on County property. We think that the sign on it clearly indicates that it is the property of the County, having been donated by the Holy Name Society.

With respect to the Menora, Your Honor, we have subpoenaed the City records in that regard. We have also subpoenaed the County records, and were told that each of the defendants will be forthcoming with a witness who will be prepared to testify as to the maintaining and erection of the items in question.

We will certainly show you, Your Honor, that they are displayed. We will show you that the Nativity scene is, indeed, stored, and perhaps the Menora as well. And at the close of our case we will ask you, Your Honor, to issue an injunction declaring that each of the governmental bodies who are defendants here are violating the First Amendment of prohibition against the establishment of religion, because they are endorsing religion, and under the case

law, as we [11] understand it, what they are doing is proscribed by the Constitution.

Thank you, Your Honor.

THE COURT: All right. Call your first witness.

MS. LITMAN: Your Honor, before I do that, may I move, for the purposes of this case, the admission of Ruthy Teitel, who is a member of the Bar of New York. Ms. Teitel is the Assistant Director for legal affairs, national legal affairs of the Anti-Defamation League. She is a member of the Bar of the City of New York and has been admitted to the Bar of the United States Supreme Court.

THE COURT: We'll be pleased to admit her.

MS. LITMAN: At this time, Your Honor, I would like to offer into evidence a stipulation which has been signed by the County of Allegheny and the plaintiffs, and if I may pass one up to the Court.

What that—

THE COURT: We'll make the stipulation part of the record.

MS. LITMAN: Thank you, Your Honor.

THE COURT: This stipulation establishes that the courthouse is owned by the County and the County Courthouse represents the seat of government, and the particulars that the County Commissioners meet and maintain offices there, the majority of the County Court of Common Pleas, Criminal [12] Division trials are conducted there, that civil cases involving amounts not in excess of $20,000 are initially heard there, the County Clerk of Court's is located there, that is, in the courthouse. The Allegheny County Controller maintains his office there, the Treasurer, Sheriff, as well as numerous official offices are located in the courthouse. And that from the conclusion of

last year's display until this erection of the display this year the Nativity scene figures have been stored on County property.

It will be made part of the record.

MS. LITMAN: Thank you, Your Honor. Shall I call my first witness?

THE COURT: Sure.

MS. LITMAN: Father.

GREGORY SWIDERSKI, having been sworn, testified as follows:

DIRECT EXAMINATION

BY MS. LITMAN:

THE COURT: This chair up here, Father.

MS. LITMAN: Your Honor, is the microphone on?

THE COURT: The light is on. If he speaks up I think we can all hear him without it. This is a hard room to be heard within, but we'll try to speak so everybody can hear.

MS. LITMAN: Okay.

[13]THE COURT: Go ahead.

Q. Father Swiderski, would you repeat, again, your name, please.

A. Gregory Swiderski.

Q. And you are a priest in the Catholic Church; are you?

A. Yes.

Q. Would you tell us, Father Swiderski, at the present time where are you located and what do you do?

A. I'm Associate Pastor at St. Raphael's Church in Morningside.

Q. And how long have you been Associate Pastor there, Father?

A. Four years.

Q. Would you please tell us a bit about your background in terms of your educational background leading up to the time you became ordained?

A. I attended grade school and high school at St. Albert's on the South Side of Pittsburgh.

Q. Is that a parochial school, sir?

A. Yes. And four years of college at St. Mary's College in Orchard Lake, Michigan, a college seminary established to prepare young men to work with Polish American Catholics. And then, four years of theology at St. Francis Seminary, Loretto, Pennsylvania, after which I was ordained in 1972.

Q. And then, starting in 1972, just can you bring us up to [14] your present pastorship?

A. In 1972 until 1977 I was Associate Pastor at St. Elizabeth's Church in Baldwin/Whitehall, and then for six months I was Associate Pastor at St. Benedict the Moor in the Hill District, and then for about four and a half years Associate Pastor at St. Mary's Parish, 46th Street, Lawrenceville, and then St. Raphael's.

Q. Now, in the studying that you did in your preparation to become an ordained priest in the Catholic Church, did that study include the study of the Bible, the Gospels and other religious doctrine?

A. Yes.

Q. Father Swiderski, would you tell us, please, whether you have seen the Nativity scene which is presently on display at the Allegheny County Courthouse?

A. Yes, I have.

Q. With respect to the Nativity scene, can you tell us what is the meaning of a Nativity scene?

A. A Nativity Scene is a, is a Catholic sacramental, in that it is a representation of something holy, with statues, and in particular, the Nativity scene represents the Gospel of Matthew and Luke, and the figures that are mentioned there as having been the birth of Jesus Christ, or who had visited that birthplace.

Q. And can you tell me whether, Father Swiderski, the [15] Nativity scene is a religious symbol?

A. Yes, of course.

Q. You say, "of course". Can you tell me why it is a religious symbol; what you say that?

A. The symbols are figures sometimes depicted with halos, the imagery of the word made flesh in the Christian tradition being represented in this baby born in a stable with swathling clothes, born of a virgin and of a man named Joseph, and of course, the scriptures. Luke presenting the message of the shepherds, and Matthew of the wisemen, who come in adoration. And then Luke, of course, also mentioning the angels who, and the star which appear to the shepherds as a guide to the birth of the infant.

Q. You said it represents the word made flesh; it that what you said? Can you explain what you mean by that?

A. The Christian understanding of God's presence in the world would say that and believe that God did not

remain aloof, but that God made a promise, and that God we believe in fulfills his promises, and promise, in particular, that promise is that his love would not, would become enfleshed in and would bring salvation for the whole world. So that God's word speaks, and in kind of distinction to sometimes the human experience when words betray and are used for lies and hurt and pain, the word of God is one that is fulfilled and the enfleshment of that word is the very sacred character [16] in that that word becomes real and tangible, and that we would say that Jesus Christ is like us human beings in all things but flesh.

Q. And is that—

A. I mean, but sin. I'm sorry. I didn't want to get my theology wrong here.

Q. And is that what I indicated the Nativity scene then represents?

A. Yes.

Q. I'm going to ask you to explain the figures in the scene in just a moment, but I'd like to ask you first, the Holy Name Society, can you tell us, Father, do you know what the Holy Name Society is?

A. Yes. I discussed that with you yesterday.

Q. Would you then tell us for the Court, what is the Holy Name Society and what is its purpose?

A. The Holy Name Society is a national organization of Catholic men established to promote the veneration for the name of Jesus, and that based on the, one of Paul's writings, where the name of Jesus, every knee should bend, and if I recall, evolved from the abuse of

the name of God, in particular, of Jesus, in the workplace. And so was there to establish for men a motivation to reverence the name of Jesus. It has a national office, as well as local diocesan offices, and that in each parish, or not in each parish, but in [17] many parishes there are individual groups of men who elect officers, have a fraternal organization in our parish. They meet once a month.

Q. And when you saw the Nativity scene on display at the Allegheny County Courthouse, did you see a, the reference to the Holy Name Society?

A. Yes.

Q. Does that reference carry any special significance with respect to this Nativity scene in connection with whether it is peculiarly Catholic as opposed to generally Christian, Protestant and Catholic?

A. Yes, in that the Holy Name Society, and also the Nativity scene itself, although I would not know that much about Protestant tradition, but the Catholic, our Catholic tradition has used, as I said, sacramentals, which were metals, rosaries and statutes in other figures, and so Catholic tradition would establish that these figures of saints and religious figures would be uniquely Catholic. Whereas the Protestant tradition such images would not be as often promoted. And then, the Holy Name Society is, as I said, a uniquely Catholic organization.

Q. Father Swiderski, with respect to the angel atop the manger in the Nativity scene, do you recall what the reading was, the words were on the angel's banner?

A. Gloria In Excelsis Deo.

[18] Q. And can you tell us—I assume that's Latin?

A. Yes.

Q. Father, what is the English translation of that?

A. Glory to God in the highest.

Q. And can you tell us, what is the source of that; is that a quotation from Catholic religious doctrine?

A. Well, it's originally from Luke, which would be Christian. However, Latin is usually associated in the past in the Catholic Church with worshipping at a Catholic Church, and—

Q. Let me ask, where in Luke is that quotation to be found?

A. Luke 2, 14.

Q. All right. Father Swiderski, just for your assistance in the testimony you are going to give, because I'd like to ask you to describe the figures, I'm going to place before you a set of photographs marked for identification purposes as Plaintiffs' Exhibits 3 through 13, which will be authenticated and offered into evidence by a later witness. But to the extent you might want to refer to those to refresh your recollection, you may feel free to do so.

Would you please, then, Father Swiderski, tell us just what figures appear in the Nativity scene at the courthouse.

A. Well, start at the top, we have, of course, the angel with the banner.

Q. And that's the banner that you just described the words of; is that right?

[19] A. Yes. And then, of course, the stable itself, the structure.

Q. And what are the figures?

A. And there's the ox and the ass.

Q. Can you tell me when you describe the figures, what the source is for those figures?

A. Well, the ox and the ass in some ways are partially presumed to be, would have been in the stable. But also, some of the scriptures, I can't exactly give you a quote from the Hebrew scriptures, but would have been one. Symbols that would have been part of the projected Christian theology would have looked back to the Hebrew scriptures and show how they were fulfilled in Jesus Christ. And so the animals there, as well as the swathling clothes, the infant in the manger come from that Hebrew scripture.

Q. Incidentally, you refer to the Hebrew scriptures. In that sense, are you talking about those that discuss the coming of the Messiah?

A. Yes.

Q. And, of course, it is the Christian theology that the events in the Nativity scene represent; is that correct?

A. Yes.

Q. All right. Now, what are the other figures?

A. The figure of Mary and Joseph.

Q. And how are they depicted in the Nativity scene?

[20] A. Well, in kneeling in front of the infant, Mary usually is wearing blue. She is here with the veil, and the infant also is laying on a white cloth, which is also a tradition of, we use a white cloth on our alters as a symbol, when we say that Christ becomes present in the Eucharist, and there's a certain tradition about that. And there are, of course, the sheep, and there are

shepherds, and the shepherds come from Luke's Gospel, as well as the angel. There's no strict tradition about how many shepherds, just that there were shepherds who came.

Q. And in the Nativity scene at the courthouse, how may are placed there?

A. Three.

Q. What other figures are there?

A. There are the wisemen or astrologers, or kings, depending on which name you prefer or translation.

Q. And from what Gospel source do they come?

A. Matthew.

Q. And how many are there in the Nativity scene at the courthouse?

A. Three.

Q. And how are those figures shown; in that, what posture are they?

A. They are presenting gifts. One is kneeling and two are standing.

[21] Q. Are there any other figures, Father?

A. There is a camel. You don't mind me saying, we don't know how all three got there on one camel, but there's one camel and one servant, and he's standing.

Q. And around the stable is there also straw?

A. Yes.

Q. Now, you made a reference to Nativity scenes in your church, in your, in the Catholic Church. It is common

to have, and usual to have a Nativity scene at the Christmas time of year?

A. Without a doubt.

Q. In the particular Nativity scene at the courthouse, did you, when you saw it, notice that it was framed by anything?

A. Yes.

Q. And what is it framed by?

A. Well, there's a bannister, wooden bannister, and then there are small evergreen trees with red bows and red and white poinsettias.

Q. And is framing the creche with red and white poinsettias, or greens, is that something which is common or usual as well in a Catholic Church?

A. I would imagine, yes.

Q. Well, have you seen—

A. Oh, yes, yes.

Q. Okay. Father Swiderski, does the Nativity scene have [22] any secular significance?

A. I would say, no.

Q. Okay. Can you tell the Court where else besides the, your Catholic Church, where in this area one could find creches or Nativity scenes?

A. Well, probably the two Catholic Churches in Pittsburgh, or in the Golden Triangle, St. Mary's at the Point or Epiphany. Some stores have them on display, various homes all over the area have them in front lawns and in their windows.

Q. Are you aware of the Nativity scene in Oakland at the Carnegie Museum, for example?

A. Yes, I am. The museum, yes.

Q. In your reaction as a Catholic Priest, Father Swiderski, is the Nativity scene at the courthouse, as you saw it, an appropriate display of the Nativity scene as you understand it and saw the one there?

A. Appropriate?

Q. Well, tell me—let me ask this. What was your reaction to the Nativity scene at the courthouse?

A. Well, the courthouse, as the document the Judge has says, is a place of, a maze, an office where City government events take place. I notice there that behind the Nativity scene there were some microphones, and those microphones were there for Christmas groups which were coming to offer music, and I suppose one of my thoughts was that those groups, in looking [23] down at the Nativity scene in front of them, might truly be communicating the religious nature of the feast, and that there might be, because some of them were public schools, might be students who were not sharing in the Christian faith, might present to in a graphic way, a very symbol of promoting the religious nature of the feast. One of the reasons that I would find, that I find the placing of the Nativity scene in the place of government somewhat offensive is that we're aware, well, I'm aware that sometimes government has not been true to values that are honest, authentic, sincere and genuine, and that the Nativity scene depicts virtues of honesty, integrity and so forth, and that they, those figures might convey, in a certain sense, could convey to me part of the, as this courtroom does, the awesomeness of the experience of coming into that building and cloak it with a meaning

of certain religiousness that might be intimidating to someone who is coming there for some of the business that you related, to which you related earlier. And so the sense of giving it that kind of blessing of religion, to me, is inappropriate, and in some ways unfortunate.

There are many people also who have called, for instance, Pittsburgh City Council a circus, and to have a religious symbol related to that building would seem inappropriate. I also find it in a difficult time when I think of the purpose of religion, to have a prophetic witness, a prophetic voice [24] often to speak in contradistinction or contrariety to various facets.

Our Catholic Bishops have just issued an economics pastoral speaking to the business community, and offering and suggesting a witness on behalf of the concerned for the poor, but when one is wedded too closely with business or with government, I would think that that prophetic witness would suffer.

I have read sections of Deuterol's Democracy in America, in which he speaks of the value of religion in this country. In his observations, in this country, he being a practicing Catholic makes the observation that he sees that when government and religion become too aligned, that ultimately the religious value is maybe lost, or so meshed together that it loses its integrity. And I think—

THE COURT: Why don't you ask another question now so that we can proceed to the point.

MS. LITMAN: Well I think, Your Honor, that that concludes the direct.

THE COURT: I beg your pardon?

MS. LITMAN: I think that concludes the direct testimony for the witness.

A. May I just add the example in my mind, excuse me, is in our country, is in Iran, where religion and politics have mixed.

[25] Q. Thank you.

MS. LITMAN: Cross examine.

MR. SPECTER: No questions.

MR. McTIERNAN: Just briefly.

CROSS EXAMINATION

BY MR. McTIERNAN:

Q. Father, you testified the Nativity scene is a religious symbol to you. The birth of Jesus was also a historical event; wasn't it, Father?

A. The birth of Jesus, as a historical event? It is, by even secular, like Josephus, an event that took place in history, yes.

Q. And the purpose of the Nativity scene is, at least in part, to depict the actual event that took place; isn't it, Father?

A. Yes. May I add, though, that the figures that surround the Nativity, that the matter of fact, one of the more interesting debates that we would have, or discussions in studying the scriptures is how historical are these figures, because the writers, Luke and Matthew, would see in those figures, pointing to a much deeper and profound spiritual experience, and that the historical value is very, in a certain sense, very little, because they are meant to point to a much deeper and more profound message.

Q. So, you're saying, to you, Father, it represents much [26] more than just a historical event; it has a religious significance to you personally?

A. Certainly.

Q. And you've made reference to a scriptural quotation at the manger scene. Isn't it a fact, Father, regardless of how historically unaccurate those scriptures are in your view, it's an important source of our knowledge of that event, the scriptural account of the birth of Jesus?

A. An important historical—

Q. Well, an important source of knowledge about the events; would you say that's a fair statement?

A. Well, I would say not about the birth, actual birth. I mean, Mark's Gospel does not say anything about the birth of Jesus, and that was the first Gospel who, that was written, even before that St. Paul wrote his letters, previous to Mark, and he says nothing about the birth of Jesus.

Q. The birth of Jesus is mentioned in the Christian scriptures; isn't it?

A. Oh, yeah. I'm saying in Matthew and Luke, but they appeared later. What I'm saying is that historically the birth of Jesus was not that important to the Gospel writers, the actual facts about the birth.

Q. Apart from the theological account and view that you're giving, Father, I'm just asking you about your statement which concerned a quotation from the scripture, St. Luke I believe it [27] was, and that scripture does provide an account of this event; does it or doesn't it, Father, yes, or, no?

A. The scriptures do, yes.

Q. Yes. And that is where that quotation is taken from, that account of this event?

A. Yes.

Q. And the events, the text that you refer to, at least, is a description of the origins of the national holiday that we celebrate as Christmas?

A. Yes.

Q. Now, you mentioned that there were some flowers and trees around this particular display, Father; correct?

A. (Nods.)

Q. And in your experience is it common for there to be flowers and evergreen trees around any Christmas display; have you ever seen them, for example, with respect to any other non-Nativity scene display for Christmas at Christmas time?

A. Ever seen poinsettias without a Nativity scene?

Q. Right.

A. Yes.

Q. Or evergreen trees and poinsettias displayed with some other holiday display?

A. Yes.

Q. That's all I have, Father.

[28] MR. McTIERNAN: Thank you.

REDIRECT EXAMINATION

BY MS. LITMAN:

Q. Father, the County Solicitor, Mr. McTiernan, has asked you about the account of the birth of Jesus, as

to whether this is a recitation of some historical event. So, in that context let me ask you this. You mentioned that a historian, Josephus, mentioned Christ in his writings; is that right?

A. True.

Q. Is it correct that that, indeed, is the only historian of that period who mentioned Jesus?

A. As far as I know, he's the only secular story, yes.

Q. Secular, right. And with respect, then, to the secular historical writings, is it correct that there is no recitation of the actual birth of Jesus, the secular historical writing?

A. As far as I know.

Q. And the account that Mr. McTiernan says that the writings of Luke provide of the the birth of Jesus, that comes from the religious writings of Christianity; is that right?

A. Yes.

Q. With respect to the scene depicted in the Nativity scene, in addition to showing the birth of the infant, doesn't it also show the, the Christian belief of the incarnation, or the, what you talked, what you talked about earlier, that is, the birth of what the Christian religion believes was the [29] Messiah; isn't that what's depicted in the Nativity scene?

A. Yes.

MS. LITMAN: No further questions.

MR. McTIERNAN: No questions, Your Honor.

THE COURT: We all through? I guess you can step down, then.

MR. PUSHINSKY: At this time the plaintiffs would call Ellen Doyle to the stand.

ELLEN M. DOYLE, having been sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PUSHINSKY:

Q. Miss Doyle, would you please state your full name for the record.

A. Yes. My name is Ellen M. Doyle.

Q. I notice before you were called to the stand that you were doing a lot of coughing. Would it be helpful for you to have a glass of water on the witness stand?

A. Yes, thank you.

Q. Miss Doyle, would you please state your address for the Court.

A. 4345 Schenley Farms Terrace, Pittsburgh, Pennsylvania, 15213.

Q. You own or rent your own home?

A. We own our home.

[30] Q. Do you pay any taxes?

A. Yes, we do.

Q. Tell us some of the taxes that you pay as a homeowner.

A. We pay County and City taxes.

Q. Give us a little bit of your educational background, and you can skip up to high school.

A. Okay. I graduated from the Emma Willard School, which is a boarding school in New York. I attended Wellsley College for two years, and then graduated from Northeastern University with an B.A. in 1972, and in 1975 I graduated from Northeastern Law School in Boston, Massachusetts.

Q. Did you become licensed to practice law in Pennsylvania?

A. Yes, I did.

Q. When was that?

A. 1975.

Q. Since 1975 have you been employed as a lawyer?

A. Yes.

Q. Can you tell us what jobs you've had as a lawyer?

A. Yes. My first job was as the Executive Director and Staff Counsel for the Greater Pittsburgh Chapter of the American Civil Liberties Union. I did that from, I think, '76 through, I believe, 1978. I then worked for the Pennsylvania Human Relations Commission as Assistant General Counsel. And I did that from 1978 to 1982. And I am now in private practice with the law firm of Berger, Kapetan, [31] Malakoff & Meyers. And I've been doing that for almost four years.

THE COURT: Can you hear, gentlemen? All right.

Q. Would you please try to speak up?

As a lawyer, have you had occasion through the years to appear before the Court of Common Pleas of Allegheny County?

A. Yes, I have.

Q. Do you have any current association with the American Civil Liberties Union?

A. Yes, I'm currently the chairperson of the Greater Pittsburgh Chapter of the ACLU, and I'm also vice-president of Pennsylvania ACLU.

Q. Are you also a member of the organization?

A. Yes, I am.

Q. As the chairperson of the local organization, can you outline your duties?

A. Yes. I am head of the Board of Directors, and I'm at chair Board meetings. I also am head of the Executive Committee and chair those meetings, and I'm responsible for a lot of the, some of the administrative development and policy making Board of the organization.

Q. Through your association with the ACLU, as an employee in the past, and currently as a chairperson of the organization, have you become familiar with the overall guides, goals, of the organization?

[32] A. Yes, I have.

Q. What are those goals?

A. The protection of the constitution and constitutional rights of individuals, with specific concern for rights protected under the Bill of Rights.

Q. How does the organization go about trying to accomplish these goals?

A. In a number of ways. One is through legislation, through litigation and public education. And then some administrative and other kinds of work. We take complaints from people complaining that their civil liberties have been violated, and we review those

complaints and do what we believe is maybe informal or formally litigate on behalf of complainants.

Q. With respect to the litigation the ACLU engages in, where do the attorneys come from who are engaged in this litigation?

A. Most of the work is performed by volunteer attorneys who are members of the organization.

Q. Do you know why the ACLU got involved in this lawsuit.

A. Yes, I do.

Q. And why was that?

A. We've had complaints for a number of years, and we've, about the erection of the religious symbols at the City-County Building and at the County Courthouse. I would say every year I can remember in the past we've had complaints, and it's been a matter of concern for us, and this year we decided to [33] go to court.

Q. Have the complaints come from members of the organization?

A. The complaints have come from both members and nonmembers of the organization.

Q. Prior to initiating this lawsuit did the ACLU, to the best of your knowledge, make any effort to attempt to resolve the dispute with the City of Pittsburgh concerning the display of a Menora outside of the City-County Building?

A. Yes. I wrote a letter to the Mayor asking that the City refrain from the erection of religious symbols, including the Menora.

Q. I'm going to show you what's been marked for identification purposes as Plaintiffs' Exhibit 1, and ask you if you can tell me what that is.

A. Yes. That's a copy of the letter which I wrote, dated November 13, 1986, to Mayor Caliguiri.

Q. Would you read that letter into the record for us.

A. "Dear Mayor Caliguiri, as the holiday season approaches, the Greater Pittsburgh Chapter of the American Civil Liberties Union would request that the City and County refrain from erecting religious symbols in places of prominence in its buildings.

"Last year the Menorah, which was hung in the front of the City-County Building was ceremonially lit during each of the eight days of Hanukkah, while the creche was displayed [34] in a like setting in the Courthouse. Our complaints to you at the time about the matter did not even receive the courtesy of a response.

"We would urge you as government officials to recognize that one religious symbol is another religion's heresy, and that the government should not be involved in the support or establishment of any religious symbols.

"Very truly yours, Ellen M. Doyle."

MR. PUSHINKSY: I move Plaintiffs' Exhibit 1 into evidence.

MR. McTIERNAN: No objection.

THE COURT: It will be received.

Q. Miss Doyle, did you subsequently receive a response from the City?

A. Yes, I did. I received a letter from Mayor Caliguiri.

Q. I'm going to show you what's been marked for purposes of identification as Plaintiffs' Exhibit 2. Can you tell us what this is?

A. Yes. This is a letter dated November 18, 1986, to me, from Mayor Caliguiri.

Q. Please read that letter.

A. "Dear Ms. Doyle, with reference to your letter of November 13, 1986, it is my intention to allow a display similar to those of the past years at the City-County Building during this holiday season. As far as I know, the County Commissioners, [35] the owner of one-half of this building, agree with this decision.

"I respect your opinion, and I would hope that you would respect mine, along with many other Jews and Christians.

"Very truly yours, Richard S. Caliguiri."

Q. Do you know who Richard S. Caliguiri is?

A. Yes. He is the Mayor of Pittsburgh.

Q. Is the letter which you read on any type of letterhead?

A. Yes. It's on letterhead from the City of Pittsburgh, Richard S. Caliguiri, Mayor.

MR. PUSHINSKY: I offer Plaintiffs' Exhibit 2 into evidence.

MR. SPECTER: No objection.

THE COURT: It will be received.

Q. Miss Doyle, did you also attend to resolve the dispute with the County concerning the display of a Nativity scene in the County Courthouse prior to initiation of this lawsuit?

A. Yes. At the same time that I wrote the letter to Mayor Caliguiri, I wrote identical letters to the three County Commissioners.

Q. Did you receive any response from the Commissioners?

A. Yes, I did.

Q. What type of response?

A. The first response was that they erected the Nativity scene at the County Courthouse, and then, after the erection [36] of the Nativity scene I received a letter signed by all three of the Commissioners.

Q. Are you familiar with the overall layout of the County Courthouse?

A. Yes.

Q. In terms of where the entrances and exits are?

A. Yes.

Q. The stairwells?

A. Yes.

Q. Are you familiar with the types of government offices which are present in the courthouse?

A. Yes, I am.

Q. Have you seen the creche which this suit concerns?

A. Yes, I have.

Q. How many times?

A. At least three times?

Q. When did you first see the Nativity scene?

A. The first time I saw it was on November 26, 1986.

Q. Would you describe what you saw upon that occasion?

A. Yes. At that time the Nativity scene was set up on the County Courthouse steps. We're talking about an area between the first floor where you're walking on the Grant Street side and between the basement floor if you're walking on the Grant Street side and the first floor. The Nativity scene consisted of 20 figures, about 20 figurines set up around the front of [37] a manger, and it was, it had at the front of it a log barrier. At that time it did not have the poinsettias and the shrubs that were described by Father Swiderski.

Q. I'm going to show you, I'm going to show you what's been marked for identification purposes as Plaintiffs' Exhibit 3. Can you identify that for us?

A. Yes. That, that is the Nativity scene. It looks the way that I saw it on November 26th.

Q. Can you tell us approximately how much of the stairwell in with was taken up by that particular Nativity scene?

A. Yes. I, I would say it's certainly between a half and one-third of the stairwell, because it consumes the middle, and then you have a passageway up on the side of the stairs. I think the fence across was about nine feet across.

Q. Would it be possible to go up those stairs to the second floor without walking around the Nativity scene?

A. Absolutely not.

Q. Going to show you what's been marked for identification purposes as Plaintiffs' Exhibit 4. Can you identify that for us?

A. Yes, I can. This is the Nativity scene at the, as it looked on November 26th.

Q. And Plaintiffs' Exhibit No. 57

A. Yes. All of these are pictures of the Nativity scene as I saw it.

[38] Q. Is there any significance to you by the position of the figures in Plaintiffs' Exhibit No. 5, which is a close-up shot of 3 and 4?

A. Well, the, figures indicate that Mary and Joseph are both on their knees with their hands clasped in a praying position. One of the kings has his head bowed, and another one of the shepherds is in what I would call a genuflection position, has one knee on the ground. And another shepherd has his head bowed. I would say that they are all in praying positions.

Q. Okay. Maybe I ought to ask you at this point in time of what religion are you?

A. Roman Catholic.

Q. So, when you say that the figures, Mary and Joseph, are in a prayful position, is that the type of position you, as a Roman Catholic, may assume when praying?

A. Yes.

Q. Going to show you what's been marked for identification purposes as Plaintiffs' Exhibit 6; ask if you can describe what's in that picture?

A. Yes. That's a picture of the angel with wings outspread on top, atop the manger, and the angel is holding a banner.

Q. Did you see that when you were there on your first visit?

A. Yes, on all of my visits.

Q. What are the words on the banner?

[39] A. The words are "Gloria In Excelsis Deo".

Q. Do you know the meaning of that phrase?

A. I do.

Q. And to you, what does that mean?

A. It means, glory to God in the highest.

Q. Do you have any idea of the origin of that phrase?

A. Yes. It comes from the Gospel according to Luke.

Q. Is that something you learned as a Catholic while you were growing up?

A. Yes. In fact, every Christmas Eve my family have always gathered together and read the Gospel according to Luke.

Q. Show you what's been marked for identification purposes as Plaintiff's Exhibit No. 7. Can you tell us what's on that exhibit?

A. Well, this is another picture of the Nativity scene, showing the sign which is erected in front of the Nativity scene. The sign states, "This display donated by the Holy Name Society".

Q. Did you see that sign when you observed the Nativity scene?

A. Yes, I did.

Q. How do you interpret that sign?

A. That the Holy Name Society, which is a religious Catholic organization, gave to the County the Nativity scene.

Q. Did you ever come across the Holy Name Society before?

[40] A. Yes. My father was a member of the Holy Name Society in our parish in Massachusetts, and there were a number of signs around my church, which would be, that, you know, certain religious relics in the church were donated by the Holy Name Society, were gifts of the Holy Name Society.

Q. What did you see on your next visit, after the November 26th visit to the Nativity scene?

A. I think the next time I went was on December 2nd, and at that time the Nativity scene had some, a podium nearby and some speakers, and were also a group of about 60 high school students massed around the Nativity scene. They were there receiving orientation for a courthouse tour.

Q. I'm going to show you what's been marked as Plaintiff's Exhibit 8. Can you tell me what this picture shows?

A. Yes. That's a picture showing a corner of the Nativity scene and the group of high school students there. You can barely see, but there's a woman who was giving them orientation to the County Courthouse, and all these students were, as I said, massed around, because the Nativity scene takes up so much space, they were all around the stairs, about to go on a courthouse tour.

Q. What was your personal reaction to the display in the courthouse?

A. I was upset that the County would be erecting what I consider to be my religious symbol, and I just, in particular, [41] when I saw the students there, I was thinking that these students aren't learning about the

Establishment Clause when they go to the courthouse to find out about how County government works and there is a, you know, a Nativity scene. Seemed to me that that was opposite to what they should be learning about the separation of church and state.

Q. Have you been back to the courthouse to view the Nativity scene since December 2nd?

A. Yes. I was there on December 9th.

Q. Had the display changed in any manner?

A. The Nativity scene was by then flanked with poinsettias and some evergreens.

Q. Going to show you what's been marked for identification purposes as Plaintiffs's Exhibits 9 and 10. Would you please tell the Court if you can identify those exhibits.

A. Yes. This would be what the Nativity scene looks like, or looked like on December 9th when poinsettias and shrubs were displayed around it.

Q. I'm going to show you what's been marked for identification purposes as Plaintiffs' Exhibit 11. Can you tell us what that shows?

A. Yes. This is looking from an angle at the Nativity scene, and it shows the sign pointing to the Board of Commissioners, the Clerk of Courts and the Sheriff's Offices. In other words, giving directions if people come into the [42] building, how to find those County offices.

Q. Was that sign present when you were there in the courthouse?

A. Yes, it was.

Q. Can you see that sign with directions to the County Commissioners' Office without viewing the Nativity scene?

A. No.

Q. About how far apart from each other are the sign and the display?

A. They are close, they are probably ten feet. It's probably ten feet away.

Q. I'm going to show you what's been marked as Plaintiffs' Exhibit No. 12. Can you identify that?

A. Yes. That's the sign on the left-hand side of the staircase pointing to the Controller and Treasurer's Office.

Q. Was that sign present when you viewed the Nativity scene?

A. Yes, it is.

Q. About how far away was the sign from the display?

A. Probably, it's probably equal distance, probably about ten feet or less.

Q. Could you see the sign pointing to the Controller's Office—strike that—the Treasurer's Office, Controller and Treasurer's Office without viewing the Nativity scene?

A. No, you couldn't.

Q. Did the inclusion of the poinsettias and the little bushes [43] to the Nativity scene change your feelings about the overall display?

A. No.

Q. Why not?

A. When I grew up in our church we always had the poinsettias around the Nativity scene. Seemed to me, reminded me more of the creche in m church when I grew up.

Q. You associate poinsettias at Christmas with being normally placed around the Nativity scenes?

A. Yes.

Q. Aside from the time when you saw the students receiving orientation, did you see any people, other people around the Nativity scene?

A. Yes, I did. There were often people going up and down the stairs, and there is also a County employee who's stationed sort of across the room from the Nativity scene, which job may, in fact, be in part to protect that. I don't know what his job was, but he was there on several occasions at a desk where he gives out the Christmas caroling book.

Q. Do you know what his name is?

A. No, I do not.

Q. I'm going to show you what's been marked for identification purposes as Plaintiffs' Exhibit No. 13, and ask you if you can look at that.

A. That is a picture of the Nativity scene, and in the front [44] is the employee whom I have seen stationed at a desk across the room from the Nativity scene.

Q. That is the man who you saw stationed by the Nativity scene?

A. Yes, it is.

Q. Did you come to court today by way of Grant Street?

A. Yes, I did.

Q. Did you happen to notice if a Menora was placed outside of the City-County Building?

A. The Menora was not up on the City-County Building when I came in, when I went to work, or came to work.

Q. Have you seen the Menora on display in front of that building in years past?

A. Yes, I have. It's directly across from my office building, so I go by it every day.

Q. Are you familiar with the types of County and City governmental functions which are normally performed inside the City-County Building?

A. Yes, I am.

Q. Will you give us a couple of examples?

A. The Prothonotary's Office, a number of Civil Courts, Allegheny County Bar Association, the Mayor's Office.

THE COURT: Can't we take judicial notice of County functions within the City-County Building?

Q. Describe your recollection of the Menora which you've seen [45] in previous years outside of the City-County Building.

A. It looks like a Menora. I think it's made out of, I believe it's made out of wood. It's a fairly large structure. We are talking about probably a 12 or 15 foot span.

Q. And about how high?

A. Certainly higher, larger than a person.

Q. For approximately how many years have you seen it on display?

A. It's been on display a number of years. I've been in my office for the last, the work I'm in now is four years, and I know, I believe it's been there every year I've been there. I don't know how long it's been up.

Q. What is your reaction to seeing a Menora outside of the City-County Building?

A. Well, I'm offended by the erection, particularly when that's fronting on Grant Street. It's a government building. I'm upset with the erection of a religious symbol. It seems to me highly inappropriate to have that, that very public, very governmental, you know, looking out on everybody, any kind of religious symbol.

Q. What is it about these two objects that is so offense about being placed in a governmental building?

A. That they represent one religious view and not other religious views.

Q. Does the presence of the Menora outside of the City-County [46] Building in any way affect your feelings about the display of the Nativity scene inside the County Courthouse?

A. Well, I think, both of them I find to be religious symbols, and I think should not be erected in governmental buildings. I'm not sure, the Menora obviously is not my religious symbol. In fact, when I was a child I weasn't allowed to participate in lighting a Menora with my Jewish friends, because it was our, both the view of my religion and my family that that was somebody else's religion, and I shouldn't do it.

With respect to the Nativity scene, we had a Nativity scene in my house when I grew up, and I have one in my house on my mantle right now. That's my religious symbol, but I think it shouldn't be presented by

government to other people, because they would have the same kind of sensitivity that I have about the, you know, the religious symbols that are not my own.

MR. PUSHINSKY: At this point in time I would like to offer Plaintiffs' Exhibits 3 through 12 into evidence.

THE COURT: They will be received.

MR. PUSHINSKY: I have no further questions at this time.

CROSS EXAMINATION

BY MR. SPECTER:

Q. Miss Doyle, you indicated that there had been prior complaints to the ACLU regarding the creche?

[47] A. Yes.

Q. Had there also been prior complaints regarding the Menora?

A. Yes.

Q. From where did they come, that is, the complaints regarding the Menora?

A. I wouldn't say they came from—you mean from both members and nonmembers of the organization? I mean, I certainly heard complaints personally from members of the organization, and I, I know our office took complaints from nonmembers.

Q. You mean people would call on the telephone and complain?

A. Yes, or they would mention it to me personally.

Q. Both members and nonmembers?

A. Yes.

Q. What was the derivation of the decision on the part of the ACLU to institute the lawsuit regarding the Menora?

A. By derivation, you know, we've had complaints for a number of years. Are you asking, are you asking why did we do it now?

Q. Yes. Why did you do it now, and how did it come about that the Board, I presume, voted to do so?

A. The Board did vot we would take legal action if the County and City proceeded to do what they had done in the past, yes.

Q. To your recollection, have complaints regarding the Menora been received during the entire period of years that it [48] has been erected?

A. You're asking me for more than I remember. I know that there have been complaints in a number of prior years. Whether it was for all years that it was erected, I don't recall.

Q. But there were complaints prior to this year?

A. Oh, yes.

Q. When was the subject of instituting this lawsuit first formally raised at the ACLU?

MR. PUSHINSKY: Objection, relevancy.

THE COURT: No, I think we'll let her answer that.

A. By this lawsuit, we have talked about a lawsuit for quite a while. The question of whether, whether and when to take the lawsuit was in part put off because there was a lot of litigation around the country, I think, which we thought was describing the contours of the erection of religious symbols. Last year I think

we talked about being prepared to, to look at the question of the erection of religious symbols, to be prepared for a lawsuit for this year if we had to.

Q. All religious symbols?

A. Well, I think the only two that have been up have been the Nativity scene and the Menora, the ones that we're talking about.

Q. To the best of your knowledge and/or recollection, did any of the lawsuits around the country involve the Menora?

A. I don't recall.

[49] Q. In any event, it is correct, is it not, that the contemplation of such a suit has been in the works for at least a year?

A. We certainly considered litigation for more than a year, I would say for several years, yes.

Q. Let me ask you this question. Does the ACLU institute a lawsuit of this nature, or any other nature for that matter, pursuant to board resolution and vote?

A. Are you saying we, we certainly do on some occasions, and on some occasions where we—

THE COURT: I can't hear you.

A. Are you asking if we initiate a suit? We initiated a suit, and we're a plaintiff in this case. I think we wouldn't be a plaintiff in a suit without a Board or Executive Committee approval.

Q. Well, in this case did the Board of the ACLU, the Pittsburgh Chapter, vote to institute this lawsuit?

A. Yes, we did.

Q. Okay. And when did it do so?

A. We voted to, that, to give authority to do so, I believe at our October meeting.

Q. Was the letter which has been introduced as Plaintiffs' Exhibit 1, that is your letter of November 13th to Mayor Caliguiri, in you view a, on your part individually or an action on the part of the ACLU?

[50] A. My letter was on behalf of ACLU.

THE COURT: I didn't hear.

THE WITNESS: My letter was on behalf of ACLU.

MR. SPECTER: I have no further questions, Your Honor.

THE COURT: We all through?

CROSS EXAMINATION (Continued)

BY MR. JANOCSKO:

Q. Mrs. Doyle, you testified, I believe, that you saw poinsettias around the Nativity scene?

A. Yes.

Q. Wouldn't it be a fair statement to say that poinsettia plants and evergreen trees are traditional decorations for the holiday?

A. Yes.

Q. And that you would find them not only around a Nativity scene, but in any, in a number of other places?

A. Yes.

Q. I believe that you also testified that you sent a letter to the County Commissioners concerning the erection of the Nativity scene?

A. Yes.

Q. I'd like to show you a document that's been marked as Defendants' Exhibit No. 1.

A. Yes.

[51] Q. Can you identify that document?

A. Yes. That was the response from the three County Commissioners to my letter.

Q. And since we'd like to give the Commissioners equal time with the Mayor, would you mind reading the letter that they sent, please.

MR. PUSHINSKY: Objection, Your Honor. That's hearsay. It's not into evidence.

THE COURT: No, I think, this is cross, and she already testified on direct that she had received a letter from the Commissioners, so I suggest we make, we mark it with an exhibit number, though, so we'll know what we're talking about in the record.

THE WITNESS: All right.

THE COURT: And then you can just make it a part of the record and she need not read it out loud, it will speak for itself.

MR. JANOCSKO: Okay.

THE COURT: Could I see it?

MR. PUSHINSKY: Your Honor, I would move, then, that that be limited for use for impeachment purposes only.

MR. JANOCSKO: Your Honor, I believe that this witness has opened the door to the introduction of that document.

THE COURT: This is cross, and she said that she had written it and had received a response. So, I think it's [52] admissible.

All right. We'll make it part of the record. What's the exhibit number on it?

MR. JANOCSKO: Defendant 1.

MR. PUSHINSKY: I'm sorry, did you just move that into admission?

MR. JANOCSKO: Yes.

MR. PUSHINSKY: Your Honor, since this is cross examination, I think it is only right that the use of this letter be used only for impeachment purposes. It would not be permissible or appropriate for the County Solicitor on cross examination to be entering direct evidence.

THE COURT: I see no objection to it. We'll receive it.

MR. JANOCSKO: Thank you, Your Honor. No further questions.

REDIRECT EXAMINATION

BY MR. PUSHINSKY:

Q. Miss Doyle, one question only. In your view does the placement of poinsettias and other plants around the Nativity scene diminish the religious nature of the symbol to you as a Catholic?

A. No.

Q. Thank you.

MR. PUSHINSKY: No further questions.

[53] THE COURT: I guess you can step down, Miss Doyle.

MS. LITMAN: Your Honor, the plaintiff calls Malik Tunador.

MALIK TUNADOR, having been sworn, testified as follows:

DIRECT EXAMINATION

BY MS. LITMAN:

Q. Your name is Malik Tunador?

A. Yes.

Q. Mr. Tunador, as you speak, if you'll just try to speak close enough to the microphone to pick up your voice; okay? Where do you live, sir?

A. I live in Crafton, Pennsylvania.

Q. What is your address?

A. 1156 Harvard Road.

Q. Are you married, sir?

A. Yes, I am.

Q. Do you have any children?

A. I have five children.

Q. Their ages?

A. Youngest one is four, the oldest one is 19.

Q. Mr. Tunador, how old are you, sir?

A. I am 47.

Q. And were you born in a country other than the United States?

[54] A. I was born and educated in Turkey, Republic of Turkey.

Q. And at what age did you leave Turkey?

A. Oh, it was about 20 years ago, so it would be 26, 27.

Q. And that would be approximately 1966 or -7?

A. 1967.

Q. And at that time, sir, did you come to the United States?

A. I came to the United States, to Pittsburgh, and I have lived in Pittsburgh since.

Q. You have to keep your voice up a bit more. Let me try to put the microphone just a little bit closer to you. There, that's good; okay?

Are you a naturalized citizen of the United States?

A. Yes, I am.

Q. And about how long have you been a citizen?

A. Eight, nine years now.

Q. Would you tell the Court, Mr. Tunador, what kind of business or occupation are you in at the present time?

A. I am educated as a mechanical engineer, and I have worked as an engineer for 20 years, ten years, and ten years ago I started my own engineering business, and for the last four years I'm solely engaged in exports.

Q. And do you have your own business, sir?

A. I have other stockholders, partners in the business, yes.

Q. But what is the name of the business?

A. Impact Marketing, Incorporated, imports, exports.

[55] Q. Mr. Tunador, to what religious faith were you born, and in what tradition have you been raised, sir?

A. My both parents are Moslem. I was born to a Moslem family.

Q. And that is, is that your religious background, sir?

A. Yes.

Q. Incidentally, Mr. Tunador, do you belong to any groups whose purpose is to stop religious and other types of discrimination?

A. Yes. I am active with the Western Pennsylvania Chapter of National Conference of Christians and Jews, and I am a member of the Panel of Americans, and also I participate in the religious dialogue group which meets once a month.

Q. Mr. Tunador, have you seen the Nativity scene which is currently on display at the Allegheny County Courthouse?

A. Yes, I have.

Q. When is the last time you had occasion to go to the courthouse, sir?

A. Last Friday was the last time I went to the courthouse, to pick up an application for the extension of my passport.

Q. And at that time did you pass by the Nativity scene?

A. Yes, I did.

Q. Had you seen it actually before that, sir?

A. In the past years, oh, about two or three years ago, I think the previous one I had an occasion to go in there.

[56] Q. At the courthouse?

A. Yes.

Q. Now, when you viewed the Nativity—oh, withdraw. Are you a taxpayer in Allegheny County?

A. Yes, I am.

Q. Mr. Tunador, when you viewed the Nativity scene, would you please describe for the Court your reaction to it?

A. Well, my religious background, Moslem religion, accepts all other religions, major religions. In fact, one of the pillars of Moslemry, to become a Moslem you have to profess believe in the gods, books and prophets, which include Jesus, Moses, from Abraham up. So, from a religious point of view I accept Christianity, as well as Judaism, as one of God's religions. However, the Moslem religion, the concept of God, God is a concept in Moslem religion, it is not a tangible being. God is omnipresent everywhere all the time, and the depiction of this concept in a tangible form is completely forbidden in Moslem religion. And it's for that reason that for centuries the painting of human beings and sculptures especially have been forbidden in Moslem religion.

So, my reaction, first reaction, personal reaction to the scene, even though I know, believe and accept that it is, it has a religious value, meaning and reverence to my Christian brothers and sisters, my personal view rather, I don't know how good I would express it, anger, or because I have [57] seen their, I see God as a tangible being, to go against, it goes against my religious belief and personal view.

Q. So that when you see the, the Nativity scene, in terms of your own personal beliefs, when you see that at the

courthouse, is it, that seeing of God shown in a statue form, is that against the precept of your religious beliefs?

A. Yes.

Q. Now, when you say that you have respect for you, your Christian brothers, let me ask you this. To you, is the Nativity scene something you view as a religious symbol?

A. To me, from my religious point of view, it has no value.

Q. What does it mean to you, what does it represent to you; does it represent some other religion?

A. It is the, it is solely the religious symbol, religious object of Christianity, as far as I'm concerned.

Q. Now, with respect to the fact that this Nativity scene is at the County Courthouse, to you have any reaction, or have you had any reaction when you saw it to that?

A. My reaction is not to the nature of the scene itself, because it, as I say, it has religious value to quite a few people. But my reaction is that it's being supported and it's being presented on a public property against the constitution of this government, and on a property that is maintained, if not built, by my personal tax money, it is maintained by my tax money, and it's, being a County seat [58] of government, it is also a place for everybody involved, every religion involved. From that point of view I am against, I feel against having one or another religion, or any religion, in fact, being supported, represented and displayed on government property.

Q. When you said before, Mr. Tunador, you said you had explained your feeling as anger, you said. Why, why was it that on seeing the Nativity scene at the Allegheny County Courthouse you felt anger?

A. Well, in this country religion and government are separated. This is supposed to be a live country, and by the government displaying, maintaining one religion's or another religion's symbols is actually discriminating against my beliefs. And as far as I'm concerned, government should stay out of religion and should not take any side as far as with any religion.

MS. LITMAN: Cross examine.

MR. SPECTER: No questions.

MR. McTIERNAN: No questions, Your Honor.

THE COURT: I guess you can step down, sir.

MS. LITMAN: Your Honor, the plaintiff has two experts who will be here this afternoon. I wonder if this might be an appropriate place, since we did not take a morning recess, for the Court to recess?

THE COURT: Well, perhaps we should take our lunch [59] recess, if they are not ready.

MS. LITMAN: Your Honor, there is one thing, if I may, the Court indicated that it would, that we would like to request the Court to take judicial notice of the functions of the City-County Building, and they are set forth in the complaint at Paragraph 26.

THE COURT: I assume no objection to taking judicial notice of the functions of the City-County Building.

MR. SPECTER: No objection.

THE COURT: Let me ask about your witnesses. Do you have another short witness now, or will they be available this afternoon? Because if there are none available now we'll just take our lunch break and come back after lunch.

MR. SPECTER: Excuse me, Paragraph 25.

MS. LITMAN: I think it's the amended complaint, 26.

Your Honor, that might be best, because then it would give us, we have, as I indicated to the Court, subpoenaed certain material and witnesses from both defendants, and that might give us an opportunity to examine those as well in the interest of expediting that testimony.

THE COURT: Would you come back at, could I suggest 1:45. That would give you an hour and a half.

MS. LITMAN: That would be fine, Your Honor.

THE COURT: Is that all right?

[60] We'll recess.

(Court recessed at 12:15 o'clock p.m.)

— — — — —

(Court reconvened.)

THE COURT: All right. Come to order. We're ready to proceed.

MS. LITMAN: Your Honor, if the Court please, we thank you for the additional time this afternoon, and we were able to work out certain stipulations which, if I may, I would like to read into the record.

THE COURT: All right.

MS. LITMAN: The City and the plaintiffs have entered into a stipulation that, first, the City-County Building is owned jointly by the City of Pittsburgh and the County of Allegheny. Secondly, that from the conclusion of last year's display up to the present time the Menora has been stored on City property. Third, the Menora is planned to be displayed shortly, up until the time the Christmas tree and the sign in front of it are removed from the City-County Building. And eight, that the City-County Building houses numerous governmental and official offices, and as to these the Court has already taken judicial notice, but I will just note for the record that the stipulation includes those same offices that were enumerated.

In addition, defense counsel have agreed, with respect [61] to the following plaintiffs, that they would testify, if they were called, in the following manner. As to Hilary Spatz Levine and Max A. Levine, that, and Michael Antol, that they would testify, the Levines would testify that they are County taxpayers; that they are admitted to the Bar; that they are lawyers whose work brings them before the courts of and into both the City-County Building and the County Courthouse; that they have seen the Nativity scene in the County Courthouse, and that they are offended by it. And furthermore, that the display of the Menora at the City-County Building does not in any way detract from or alleviate the offense that they feel at the City, at the County's display of the Nativity scene; that they are members of the Jewish religion. Michael Antol would testify in the same manner, but it is agreed that if he would testify he would say in addition that in his use of the courthouse he goes out of his way to avoid viewing the Nativity scene, and indeed, uses a side entrance to enter the building. Michael Antol is a member of the Greek Catholic religion. And finally, Reverend Wendy L. Colby would testify that she is a Reverend and Minister in the Unitarian religion; that neither the Menora nor the Nativity scene are symbols

of her religion; that she has seen the Nativity scene, and that she is offended by it.

Thank you, Your Honor.

THE COURT: With the stipulation, do you mean that [62] you finished calling your witnesses?

MS. LITMAN: No, Your Honor. That is the stipulation as to those.

THE COURT: All right.

MS. LITMAN: The plaintiff has additional witnesses, but I have been informed that there is a motion to be presented before the Court.

THE COURT: All right.

MR. SAUL: Your Honor, if I may.

THE COURT: Yes.

MR. SAUL: My name is Charles Saul. I'm an attorney, and I've been asked by ——

THE COURT: I know you, Mr. Saul. I say we're acquainted.

MR. SAUL: Yes, we are.

I have just been asked by Chabad — C-h-a-b-a-d — House to represent them in this matter. Chabad House is the owner of the Menora which is one of the subjects of this claim that's before you, and I would respectfully ask the Court permission to intervene for Chabad House as a party in interest in this matter.

I apologize for the lateness of this, and the fact that it's not in writing, but basically there have been considerable time constraints and difficulties, under all the circumstances, in getting counsel. Indeed, the counsel—I may just be heard [63] today, and the counsel which we would

expect to be representing Chabad House is tied up in court, was tied up in court last week and is in court this very day. But to protect Chabad House's right in the property and whatever constitutional rights there may be, and the permission of displaying the Menora, we would respectfully ask that the Court grant our motion to intervene.

THE COURT: Well, let me see if other counsel have any objection. I have none.

MS. LITMAN: Your Honor, the plaintiff would, plaintiffs would object for the following reason. I assume that this motion is made pursuant to Rule 24, 24(b) on permissive intervention, and I would respectfully point out to the Court that the Chabad House is not a party to this action, if, indeed, it is true, as Mr. Saul asserts, that they are actually the owners of the Menora, I don't know whether this is true, but if that is true, Your Honor, their ownership is in no way involved or threatened by the proposed order.

The proposed order that we ask in this action is to enjoin City and County from enforcing religion by allowing the display on the City-County Building, and the Chabad House will not be affected by this order. It will be free to use this Menora, if indeed it does own it, in any fashion it likes that is consistent with the consititution. It can place it in other places. And I don't think it appropriate for them to [64] be parties to this action.

THE COURT: What's you position, gentlemen?

MR. SPECTER: I have no objection to it, Judge.

THE COURT: You have no objection?

MR. SPECTER: No objection.

MR. McTIERNAN: County has no objection either, Your Honor.

MS. LITMAN: Your Honor, I would suggest that at most, if—

THE COURT: Well, now wait a minute. I must understand before I can rule.

You represent the owners of the Menora?

MR. SAUL: Correct.

THE COURT: Their ownership is not in question. What is it that you wish to vidicate on behalf of the owners of the Menora?

MR. SAUL: Well, they want to be able to continue, as they have in the past, to display the Menora on the property in question. And I believe in the interest of a full and fair hearing we need to be present to protect our rights to engage in that constitutional act.

THE COURT: Well, I guess, I guess if the city is permitted to display it, then the title to the Menora is not in question, and we'll permit the City to do it. If the City is not permitted to do it, your ownership wouldn't make [65] any difference anyhow, so I think Ms. Litman is right, there's really no issue here with respect to your ownership.

MR. SAUL: Correct. I would agree.

THE COURT: We'll let you say for the record that you encouraged the city, if that's what you wish to say, to display it, that you have no objection to their using it, and beyond that, I don't think your title is in dispute.

MR. SAUL: No, I'm not claiming it is, Your Honor, that it's the title to the Menora that's in dispute. It's our right to display it on public property that's in dispute, and I believe that's a constitutional right. In an interest of a full and fair hearing we would respectfully request that the Court permit us to come in as a party of interest.

THE COURT: Well, do you intend to advance the proposition that you have a right to display it?

MR. SAUL: Correct.

THE COURT: Well then, I guess we should ask you to address that, then, Ms. Litman, because counsel says, Mr. Saul here saying that they want to take the position that it's something that they have the right to display, and I suppose that means that they have the right to display it on a public building. So, maybe we should let him intervene.

MS. LITMAN: If I may address that, Your Honor.

First, of course, this comes as a total surprise, so although I know that Mr. Saul was aware as of the day of the [66] filing that this was filed, and we spoke briefly at the Clerk's Office on the very afternoon it was filed, but nevertheless, attempting to address what right he might have here, that would not be properly protected by the City and County. It seems to me, Your Honor, that there is nothing that would entitle them to become a party.

I point out to Your Honor Rule 24(b) on permissive intervention recites that upon timely application anyone may be permitted to intervene. I don't think that this application is timely. The hearing is, it seems to me, well over half over, that the Court may consider it, that it is a matter for the Court's discretion. And I point out to Your Honor that with respect to that, Rule 24(b) says, in exercising its discretion that Court shall consider whether the intervention will unduly delay or prejudice the adjudication of rights of the original parties. I think it might very well do that, Your Honor.

In addition, the procedure, Rule 24(c), which Mr. Saul must know, requires that a party desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. He has not done that. The purpose of that Rule,

Your Honor, is that the motion shall state the grounds and shall be accompanied by a pleading setting forth the claim or defense when such intervention is sought, and he has not complied with that. And, therefore, Your Honor, we have not [67] been given the opportunity to address this matter as the Rules provide.

Counsel has failed to provide me—

THE COURT: All right, let me rule.

I think Ms. Litman is correct. I think I'll sustain her objection on the basis of timeliness.

I regret not letting you intervene and speak on behalf of your clients, but I think Ms. Litman is correct, that—

MS. LITMAN: Thank you, Your Honor.

THE COURT: —your motion is not timely.

MR. SAUL: Well, if I could just respond to that, Your Honor.

MS. LITMAN: Thank you, Your Honor.

MR. SAUL: We have been under certain time constraints. Chabad House was never served with a copy of the complaint. I personally have been out of town from Friday morning at 7:30 'til last night at 6:30 p.m., and it really only became apparent as the evidence was being adduced this morning that our constitutional rights were being affected by this hearing to the extent that we really needed to have a presence.

I see no prejudice whatsoever to the ACLU by our intervening. I do not see any type of undue delay, and I'm somewhat shocked that the ACLU should be raising these technicalities and an organization that is supposed to uphold the rights of the individuals, their constitutional rights, and I don't [68] understand why they feel that they

are so prejudiced by our being able to intervene, so that a full and complete record could be made in this matter.

MS. LITMAN: Your Honor, if I may, I can't address—

THE COURT: I see no point in you keeping the argument going back and forth. We're cognisant of the rights of both of you, but we ruled, and we'll proceed with the hearing.

MR. SAUL: Thank you.

THE COURT: Your record, I think, is adequately protected.

MR. SAUL: Thank you.

THE COURT: All right. Call your next witness.

MR. PUSHINSKY: We call Howard Elbling.

HOWARD ELBLING, having been sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PUSHINSKY:

Q. Please state your full name for the record.

A. Howard Elbling.

Q. Your address, Mr. Elbling.

A. 6306 Forward Avenue, Pittsburgh.

Q. Do you own that home?

A. Yes, I do.

Q. Do you pay any taxes?

A. Yes, I pay property taxes.

[69] Q. Mr. Elbling, if we commence with the post high-school education, would you tell us briefly your educational background?

A. Graduated from the University of Pittsburgh in 1973, a Bachelor's degree in English. Graduated from the University of Pittsburgh School of Law in 1977.

Q. Did you subsequently become licensed to practice law in the Commonwealth of Pennsylvania?

A. Yes, occurred in early 1978.

Q. Since becoming licensed to practice law, have you held legal positions?

A. From beginning of 1978 through September, 1980, I was a staff attorney with the Child Advocacy Legal Aid Office of Neighborhood Legal Services. From September, '80 through September, 1981, I transferred and became a staff attorney at the Homewood Office of Neighborhood Legal Services Association. In October, 1981, I accepted a part-time job as a clerk for the Honorable Raymond A. Novak of the Court of Common Pleas of Allegheny County, and at that time I also started a private practice.

Q. Have you continued in that private practice and in your position as a law clerk to a Common Pleas Judge since taking on those positions?

A. Still employed in both capacities, yes.

Q. What type of Judge is Judge Novak? Strike that.

[70] What types of cases does Judge Novak hear?

A. Judge Novak is, he's a good Judge, he's currently assigned to the Criminal Division of the Court of Common Pleas. He also is assigned on a part-time basis to the Juvenile Section of the Family Division.

Q. Where's the Judge's courtroom located?

A. His Chambers and courtroom are located at 305 County Courthouse.

Q. What floor of the courthouse is that on?

A. Third floor.

Q. What are your duties as Judge Novak's law clerk?

A. My primary duty is to research and write opinions on cases that have been appealed. I also screen his mail, I also review all pre- and posttrial pleadings that come through the court, advise him on these matters. From time to time I serve as a master in the juvenile section during detention hearings at Shuman Center. I sit in chambers with the Judge during pretrial and posttrial conferences, listen to arguments of counsel.

THE COURT: Isn't that enough?

Q. What type of cases do you handle through your private practice?

A. General practice of law, criminal cases, civil cases, Family Division matters, estates.

Q. Does your position as a law clerk to Judge Novak require [71] you to be in the courthouse?

A. Yes, it does.

Q. How frequently?

A. Approximately three, four days a week.

Q. Does your private practice necessitate your presence in the courthouse?

A. On occasion.

Q. Could you perform your duties as a law clerk without going to the courthouse?

THE COURT: Obviously not.

A. No.

THE COURT: Next question.

Q. What would happen to your private practice if you were not to attend the courthouse?

THE COURT: Obviously a private practitioner has to go to the courthouse once in a while.

Next question.

Q. Do you perform the same duties in the City-County Building?

A. I only go over to the City-County Building for, to go to the law library on behalf of Judge Novak, although in my private practice I do appear in court in the City-County Building.

Q. What route do you normally take when you enter the courthouse to get to your courtroom?

A. Depends where I park my car. If I park in the Kaufman's parking lot, which I did most often—

[72] Q. If I may interrupt for a second, just starting with when you went to the courthouse, how do you get to the courtroom?

A. You go in through the, generally through the Grant Street entrance.

THE COURT: Why don't you just ask him, to perform his duties does he have to pass this particular location.

Q. Mr. Elbling, in the performance of your duties do you pass the location where the Nativity scene has been on display?

A. Yes, I do.

Q. On the average day about how many times do you pass that particular location?

A. Between four and six.

Q. Have you seen the Nativity scene?

A. Yes.

Q. On how many occasions?

A. Say between 30 and 35 times this year.

Q. Describe what you have seen.

A. The first, first time I saw it was after Thanksgiving, and there was a scene on the steps in the middle of the, I guess it's between the, on the landing between the first and second floors. There's a wooden stockade fence around the scene with some figurines, a Nativity scene. There was an alter-like structure on the back of that display.

Q. Could you take those stairs without detouring the around the Nativity scene?

[73] A. Well, you couldn't walk straight up the middle of the steps. You'd have to veer either to your right or your left, walk around it.

Q. Is the Nativity scene part of your religious heritage?

A. No. it isn't.

Q. Of what religion are you?

A. Jewish.

Q. How did you react to the display of the Nativity scene?

A. I was quite offended by the Nativity scene first time I saw it.

Q. Why is that?

A. It evoked in me a feeling that I was part of a minority and that the County was putting a stamp of approval on Christian religion, and particularly the holiday of Christmas.

Q. Can you get to work by your normal route without passing the Nativity scene?

A. By my normal route, no.

Q. Now, you testified that as to how you felt when you first saw the Nativity scene.

Did you feel any differently on the subsequent occasions that you were able to view it?

A. I guess I would say that I felt a little, every time I would pass it I would feel a little more offended. I looked at it more closely. One time I remember focusing in on the little figurine of Jesus, and it has an oversized type of head, [74] and figures are not to proportion, and that just evoked from me a memory of middle ages time when my people were persecuted and forced to live in guettos. You know, as a, as an American, as a tax paying citizen, I don't think that I have to be reminded of that as I walk into a public building.

Q. And that's the building that you work in?

A. That's correct.

Q. Going to show you what's already been offered as Plaintiffs' Exhibit 7, and ask you if that is, if you have

seen the sign which appears at the bottom of the picture when you've seen the Nativity scene?

A. Yes, I have seen that sign.

Q. What does that sign say?

A. It says, This display donated by the Holy Name Society.

Q. What meaning does that convey to you?

A. I took that to mean that it was a gift from the Holy Name Society, which I'm not familiar with, but I would assume it's a, by its name, probably a Catholic organization.

Q. Do you perceive the Nativity scene as a religious symbol?

A. Yes, I do.

Q. Going to show you what has been identified by an earlier witness as Plaintiffs' Exhibit 13 — this has not yet been offered into evidence — and ask you to explain what's in that picture.

A. This is also a picture of the Nativity scene. This one [75] is surrounded by, the scene is adorned by red and white poinsettias, and there's also a gentlemen walking across in front of that.

Q. Do you know who that gentleman is?

A. Yes, I do.

Q. Who is he?

A. I believe his name is Frank Williams.

Q. And do you know what he does in the courthouse?

A. I don't know his exact position there. However, I see him often sitting at a desk on a landing, I guess it would be to the right of the, as you're looking at the Nativity scene. I just know him from walking up and down the steps a lot when we greet each other.

Q. Do you know if he's an employee of the County?

A. I assumed that he is. I don't know for sure.

Q. And what leads you to that conclusion?

A. That he sits at a desk, and that there are often signs telling you to see Mr. Williams for information concerning various displays.

Q. Have you seen him at that normal post which you've described during the time that the Nativity scene has been on display?

A. I can't recall specifically seeing him there, no.

MR. PUSHINSKY: At this time I'd move to admit Plaintiffs' Exhibit 13 into evidence.

THE COURT: I assume no objection.

[76] MR. SPECTER: No objection.

MR. McTIERNAN: No objection.

THE COURT: We'll receive it.

May I see it, please.

Mr. Elbling, have you in the past seen the Menora which has been annually displayed outside of the City-County Building?

A. Yes, I have.

Q. What is your reaction to the display of the Menora?

A. Well, it's, I have a mixed reaction to that one. In one respect I'm proud as a Jewish person that the symbol of my religion is displayed. However, I get the impression by the placement of that Menora next to a Christmas tree of similar size that they are mainly to appease Jewish people, and I'm offended by the fact that people are trying to equate Christmas and Hanukkah. The holidays have nothing to do with each other, they merely happen to fall in approximately the same period of time.

Q. Does the presence of the Menora at the City-County Building in any way diminish the offense nature of the creche at the courthouse to you?

A. No, it doesn't.

Q. If the creche was placed next to the Nativity scene, would that diminish the offensive nature of the display? Strike that question.

If the Menora was placed next to the creche in the County [77] Courthouse, would that in any way diminish the offensive nature of the creche display?

A. No.

MR. PUSHINSKY: No further questions.

MR. McTIERNAN: Your Honor, just briefly.

CROSS EXAMINATION

BY MR. McTIERNAN:

Q. Mr. Elbling, you're an employee of the Allegheny County Common Pleas Court; is that correct?

A. Well, I'm a personal employee of Judge Novak. I'm on the County payroll.

Q. You receive your pay from the County.

And isn't it a fact that Christmas day is a holiday for all County employees?

A. That's correct.

Q. And I assume the same will be on this year, too, for Christmas day?

A. That's my understanding.

Q. Is that, in fact, somewhat of a recognition of the Christmas holiday in and of itself?

MR. PUSHINSKY: Objection, Your Honor; relevancy. The only two things at issue in this proceeding are whether the County may constitutionally display a Nativity scene inside the County Courthouse, and whether the City and/or the County may erect a Hanukkah Menora outside of the City-County Building.

[78] Whether or not—

THE COURT: I think the question is relevant to the general overall subject. I think the purpose of the question is to demonstrate that paying people on Christmas day and giving them the holiday time is probably a recognition of a holiday. We'll let him answer it, but I think the answer is obvious. I think we can take judicial notice of the fact, as well, that almost everybody in government gets a paid holiday on Christmas day.

MR. PUSHINSKY: Your Honor, if I may emphasize, it's not the recognition of the holiday by the government which is at issue in the present case, but whether the governing bodies inside the seat of government may display the sacred symbols of that holiday.

THE COURT: I understand, and we'll hear your arguments at the usual time. And I think I understand your argument.

MR. PUSHINSKY: Thank you, Your Honor. The record is clear.

BY MR. McTIERNAN:

Q. One final question, Mr. Elbling. A couple of previous questions you mentioned that you see Frank Williams when you go through the courthouse lobby; isn't that correct?

A. Correct.

Q. Isn't it correct, you see Mr. Williams at other times of [79] the year?

A. See him there all year round.

Q. He's there all year round; isn't he?

A. Yes.

If I may add to your other question, I work quite often on Christmas day.

Q. Are you required to work on Christmas day by the County of Allegheny?

A. I'm required by my position to get work done on a certain time frame. If it happens to be convenient for me to work on Christmas day, I do that.

Q. Thank you.

THE COURT: Well, I think we can take judicial notice of the fact many people work on Christmas day, depending upon whether they want to work or not.

Anything else?

MR. SPECTER: No questions.

MR. PUSHINSKY: Just a couple more, Your Honor.

REDIRECT EXAMINATION

BY MR. PUSHINSKY:

Q. On those occasions that you did see the Nativity scene, Mr. Elbling, that wasn't a Christmas day; was it?

A. No.

MR. PUSHINSKY: No further questions.

THE COURT: I guess we're through with you.

[80] MR. PUSHINSKY: Without objection from the Court, I'd like to authorize Mr. Elbling to leave.

THE COURT: Oh, yes, I think he can leave. You have no objection?

MR. SPECTER: No objection, Your Honor.

MR. McTIERNAN: No objection.

MS. LITMAN: Reverend Robert Brashear, Your Honor.

ROBERT L. BRASHEAR, having been sworn, testified as follows:

DIRECT EXAMINATION

BY MS. LITMAN:

Q. Reverend, your name is Robert Brashear?

A. That's correct.

Q. And would you tell us, please, of what religious denomination are you a Reverend?

A. I'm an ordained Presbyterian Minister.

Q. I'm going to ask you about your schooling in just a few moments. but would you please tell the Court what is your present employment?

A. I'm presently the Executive Director of the South Hills Interfaith Ministry.

Q. South Hills Interfaith?

A. Ministry.

Q. Would you explain for us, please, what the South Hills Interfaith Ministry is?

[81] A. It's an organization that is made up of approximately 50 member groups of various congregations and denominations ranging from Roman Catholic to Presbyterian to Methodist to Jewish, Unitarian. We're involved in ministries of direct aid, meeting in terms of food, clothing, et cetera, psychological counseling, unemployment, work, and also groups to promote understanding between people of various faiths and ethnic groups.

For example, dialogue groups, Martin Luther King celebrations, et cetera.

Q. Can you tell me, Reverend Brashear, of what faiths or religions you are aware in Allegheny County in addition to those you have enumerated; that is, Christians, Jews, I think you said Unitarians. I don't know if that comes under Christians or not. But are you aware of the existence in Allegheny County of other religious groups?

A. First of all, the Unitarian congregation among our own ministry informs us they are neither Christian nor Jewish, but Unitarian.

I've also had occasion to meet various groups here, members of the Islamic and Hindu faith traditions.

Q. And in connection with that, would the Islamic — is that the same as Moslem?

A. Yes, it is.

Q. Are there mosques in Allegheny County?

[82] A. There are.

Q. And with respect to the Hindu religion, are there Hindu temples in Allegheny County?

A. At least one.

Q. All right. Now then, would you tell us, please, what was, what is your religious background and training.

A. As I said, I'm an ordained Minister of the Presbyterian Church, member of Pittsburgh Presbytery, was ordained in Eastern Oklahoma Presbytery in 1976.

Q. Where were you educated before that time, starting with your college education?

A. Went to college at the College of Worcester, and went on for my graduate work in Divinity School at Yale University.

Q. When did you graduate from Yale's Divinity School?

A. 1975.

Q. All right. Then, starting then in 1975, would you tell us what you did.

A. I served for approximately ten years as an Associate Pastor at the First Presbyterian Church in Tulsa, Oklahoma. Also served as Director of Urban Ministry for the Presbytery of Eastern Oklahoma, and came to Pittsburgh in April of 1985.

Q. And when did you become an ordained Presbyterian Minister, Reverend Brashear?

A. May, 1976.

Q. In order, incidentally, to become so ordained, must one [83] take and pass any examinations?

A. Yes.

Q. Would you just tell us briefly what those are?

A. The first of which is, is a Bible content exam. Then we're given a series of examinations, tests, both our knowledge of our own traditions and our capacity to work with that knowledge.

Q. Reverend Brashear, I show you photographs in evidence here which are marked as Plaintiffs' Exhibits 3 through 13, and I'd like to ask you if you will take a few moments to look at those.

Have you examined them?

A. I have.

Q. Those have been described in evidence as photographs of a Nativity scene which, in fact, is at the Allegheny County Courthouse. From your examination of them, can you, indeed, confirm that those are, in your view, a Nativity scene?

A. I would describe this as a traditional Nativity scene, yes.

Q. And can you tell me, Reverend Brashear, whether that traditional Nativity scene is a religious symbol?

A. From my tradition, it is a religious symbol.

Q. And can you tell us, please, when you say "from my tradition", of what tradition you speak?

A. Okay. First off, I would say that traditionally people in [84] the Protestant faith did not necessarily use these kinds of representations. They have certainly

become more popular with us. In my own church in Tulsa, Oklahoma we have the very large one. If you came to my office this week you'd find one in our own window. So from my tradition as a Christian, this is understood to be a representation of the birth of Christ.

Q. And when you say it's to be a representation of the birth of Christ, can you tell me from what that Nativity scene or representation comes; that is, from what is drawn those figures and that scene, and the manger and the people who are present in the Nativity scene, what is the source of it?

A. In these particular pictures you find something that falls directly in the tradition, is introduced by, St. Francis of Assisi originally used to teach illiterate persons of the story of the birth of Christ. This has been popularized among us. It takes two different traditions, one from the Gospel according the Matthew and one from the Gospel of Luke, and combines them into one representation.

The kings or magis that appear in the picture are from the Gospel according to Matthew. The shepherds are from Luke, as is the angel.

Q. We, we heard testimony this morning that referred to something called the, the incarnation. Does the word "incarnation" have some meaning to you, Reverend Brashear?

A. Obviously the only, the only importance Christmas has is [85] if one begins with the understanding of Jesus as Son of God.

In other words, when I teach courses on Advent, what I usually like to say is Christmas only makes sense if you first of all believe in Easter. Now, what that means, then, is

going back to this event, that what we have in this particular scene is that moment in time when God came to earth and took on human flesh. The word "incarnation" means, God becomining human. And that's what is represented in the Nativity scene.

Q. And when you say "this particular scene", you referred to the Plaintiffs' Exhibits 3 to 13, the photographs you have there before you?

A. Yes.

Q. Reverend Brashear, is there any secular symbol represented, is there any secular purpose presented by the Nativity scene?

A. The Christmas scene, as I stated earlier, particularly the ones of Jesus, Mary, Joseph, the angels, the kings, has no meaning outside of a faith tradition.

Q. That's the Christian faith or tradition?

A. Yes.

MS. LITMAN: Cross examine.

MR. SPECTER: No questions.

MR. McTIERNAN: No questions, Your Honor.

MS. LITMAN: Thank you.

Your Honor, the plaintiff calls Rabbi Mark Staitman.

[86] **MARK N. STAITMAN,** having been sworn, testified as follows:

DIRECT EXAMINATION

BY MS. LITMAN:

Q. Rabbi Staitman, would you repeat your full name for the Court, please.

A. Mark N. Staitman.

Q. And where do you, where are you presently employed, Rabbi Staitman?

A. I'm the Associate Rabbi of the Rodef Shalom Congregation, Fifth and Morewood, Pittsburgh, Pennsylvania.

Q. And for how long have you been so employed, Rabbi Staitman?

A. I've been a Rabbi at Rodef Shalom for 11 years.

Q. Would you please tell His Honor, and for the record, where and when you received your religious training, starting with when you went to college.

A. I was graduated from California State University in North Ridge in 1970. Concurrent with my studies there, I was an undergraduate student at the Hebrew Union College, Jewish Institute of Religion in Los Angeles. That is the reform seminary. I continued, beginning in August of 1970, as a graduate student at the Hebrew Union college. I spent one year in the campus in Jerusalem, three years in our school in Los Angeles, my final year in our school in Cincinnati, and was ordained by the Cincinnati School in June of 1975.

[87] Q. Now, when you say you were ordained, is there any particular qualification or type of ordination that a Jewish Rabbi receives?

A. There are three forms of ordination. Ordination for Rabbis is a, in a sense, form of licensure by the Jewish community. One permits one simply to teach. That is called the Yoreh-Yoreh — Y-o-r-e-h—Y-o-r-e-h. The second permits one solely to render legal decisions. That is called Yadin-Yadin — Y-a-d-i-n—Y-a-d-i-n.

The third is called Yoreh-Yadin, and it is a combination of the two. Permits one both to teach and to render legal decisions.

The ordination I have is the third type. It permits me both to teach and to give decisions in Jewish law.

Q. Now then, Rabbi Staitman, in past years in the City of Pittsburgh have you had the occasion to see at the City-County Building a Menora on the steps there?

A. Yes.

Q. And with respect to that Menora, is it what is known as a Hanukkah Menora?

A. Yes, it is.

Q. Would you please explain for the Court what is Hanukkah—C-h-a-n—Rabbi, can you give us your spelling, because it will be more accurate.

A. There are any number of them. H-a-n-u-k-k-a-h.

Q. Okay. What is Hanukkah?

[88] A. Hanukkah is the holiday that marks the rededication of the temple in Jerusalem following its recapture by the Maccabbees during the Hasmonean revolution. That was the revolution against the Seleucid empire, which began in 168 B.C.E.

Jerusalem was recaptured and the temple rededicated on the 25th day of the month of Kislev—K-i-s-l-e-v—in the year 164 B.C.E.

Q. Incidentally, when is Hanukkah going to start on the English calendar this year?

A. This year it begins on the 27th of December, but in the Jewish tradition all holidays begin on the evening before, because in our tradition the day itself begins in

the evening. So it would begin at sundown on the 26th.

Q. In the previous years that you have seen a Hanukkah Menora on the steps of the City-County Building, has it been approximately at the time the Hanukkah, that Hanukkah falls?

A. Yes.

Q. Now, having explained to us what Hanukkah is, would you please explain for the Court, what is a Hanukkah Menora?

A. In the Temple in Jerusalem there was a large room called the Holy of Holies. In front of that room there was a seven branch Menora that was to be kept burning continuously, and there was a rather elaborate ritual for cleaning that. It had to be cleaned and refilled with oil each evening. That was a symbol of the eternal presence of God in the Holy of [89] Holies. At the time that the temple was captured by the Seleucid, the Germans, the Menora was extinguished. When the Maccabees rededicated the temple it was necessary for them to relight that Menora.

There is a legend that there was insufficient oil for this to last beyond one day, there was but one cruse of oil, one container of oil, but miraculously this oil lasted eight days, which was the length of time that it took to get new oil so that the Menora could continue to burn.

The Menora that we use today is a symbol of that original Menora which stood before the Holy of Holies.

Q. Incidentally, I don't think the record yet shows, how many days in the Jewish religion does Hanukkah last?

A. Lasts for eight days.

Q. And this might be obvious, but is that because of the eight days that the oil lasted as you've described?

A. Yes, it's in keeping with the tradition of the miracle of the oil lasting for eight days.

Q. Rabbi Staitman, is a Hanukkah Menora, then, a religious symbol?

A. It is. And let me see if I can explain to you what we in the Jewish would refer to as the symbol.

Q. All right.

A. Judaism is different from Christianity. Christianity is a religion which is based on faith. Judaism is a religion [90] which is based on the performance of religious acts, which we refer to as mitzvot—M-i-t-z-v-o-t. Mitzvot are what we perceive to be divinely commanded acts. In our tradition there are 613 mitzvots, all of which come from the Torah, which are the first five books of the Bible.

Now, in addition to those 613 mitzvots, there are others which are ordained by the Rabbis, meaning the Rabbis during the period of the Talmud. The Talmud is a code of Jewish law codified in the sixth century. Any article used in the performance of a mitzvah, that's the singular of mitzvot—m-i-t-z-v-a-h—which is used voluntarily for the performance of the mitzvah, we see as in some way special.

For example, an Orthodox Jew wears an article of clothing which has four corners and ritual fringe, which are called tizit tizit — t-i-z-i-t — phonetic. Now, anyone who has children knows that when a child undresses he tends to throw his clothing, so one would expect a child upon taking off a sweater to simply throw it, or taking off a shirt, to throw it. That's not the case, however, with this garment.

It's treated with a special sense of sanctity, because it is the article by which a mitzvah is performed.

One can drink wine out of any container, but we in our tradition use a special container for drinking wine on the sabbath and holidays, a kiddush cup — k-i-d-d-u-s-h — and that's dealt with in a special way.

[91] And so, too, the Menora that we use for the lighting of the candles as Hanukkah. It's used solely for the performance of this Mitzvah.

Q. Is this act of lighting the Hanukkah Menora one of the Mitzvot that you have described?

A. It is one of the Mitzvot ordained by the Rabbis, as opposed to one contained in the Torah.

Now, the Menora, to take it one step beyond, one is not permitted to use the light from the Menora for the purpose of illumination. You're not permitted to read from that light. The Code of Law specifically precludes that. That is in order to show that the Menora is a symbol of the celebration of the miracle.

Q. And when you say "the miracle", you're referring to?

A. Well, that gets us into a bit of the theological debates.

Q. Without that, can we just say generally the miracle of the fact that the oil, instead of lasting the one day, lasted the eight; would that be over simplification?

A. Omar Maimonodes argues that it's the miracle of the success of the Maccabees over the Seleucids.

Q. In addition, then, to what you've explained to us, that the Hanukkah Menora is a religious symbol, due, did I understand your testimony correctly that the lighting of the Menora is, then, a religious act?

A. It is most definitely a religious act.

[92] MS. LITMAN: One moment.

Q. Rabbi Staitman, would it be correct to say that with respect to that miracle that you refer to, that the Hanukkah Menora and Hanukkah are symbols of, would it be fair to say that it's either divine intervention that made the Menora stay lit, or under the other theory, it's divine intervention that inspired the success of the Maccabees?

A. Yes.

MS. LITMAN: Cross examine.

CROSS EXAMINATION

BY MR. SPECTER:

Q. Rabbi Staitman, do I understand your testimony to be that the holiday of Hanukkah marks, in addition to the rededication of the temple, the actual recapture of that temple?

A. No. The holiday of Hanukkah is a holiday which is specific to the rededication of the temple. The word "Hanukkah" in Hebrew means to dedicate. So the holiday is specific to the rededication of the temple, but you could only have the rededication of the temple following its recapture from the Seleucids.

Q. So, you are saying that they are two independent events; one, the recapture, and two, the rededication, and that it is the rededication alone which is memorialized, so to speak, in the holiday of Hanukkah?

A. That's correct.

[93] Q. Is that, in your opinion, the belief of all branches of Judaism?

A. Well, here I would have to make a distinction between what formal theology says and what individuals say. In other words, there might well be members of my congregation who view Hanukkah differently from what reformed Judaism teaches of Hanukkah. Certainly all branches of Judaism, which is to say, reformed, conservative, orthodox and reconstructionist Judaism, on a theological level see Hanukkah as the celebration of the rededication of the temple in Jerusalem. There are also those Jews within the Jewish community who are non-theistic. I don't want to say atheistic, because I don't know whether they believe in God or they don't, but they base their celebration on the holidays on something other than religion, and they would see the celebration of Hanukkah as a cultural or national event, rather than as a specifically religious event. But I don't think that that represents, it certainly doesn't represent the four major religious branches of Judaism.

Q. But it does represent an independent thought, so to speak?

A. Surely.

Q. And it represents an independent thought within the Jewish community at large?

A. Whether that's a significant portion, I couldn't say, but it certainly exists.

Q. Going back for a moment to the Menora itself, Mrs. Litman, [94] in her direct examination, spoke of a Hanukkah Menora, and I, therefore, ask you, how does it differ from a plain Menora; that is, without the word "Hanukkah" preceding it?

A. All right. The Menora, the word "Menora" means candelabra. Within the Jewish tradition there are two

forms of candelabra which have a place in the tradition. One is a seven branch candelabrum, which is a direct representation of the candelabrum which existed both in the tabernacle built in the desert, and then in the temple in Jerusalem. The second is an eight branch, or now, as there is a tradition of using a separate candle to light the Hanukkah candles, now a nine branch candelabra, which is used specifically on Hanukkah, but has its basis as a symbol of the Menora which stood in front of the Holy of Holies in the temple in Jerusalem.

Q. So that the one that was in the temple in Jerusalem prior to its capture by the—

A. Seleucids.

Q. —Seleucids—thank you—was a seven holder candelabra?

A. That's correct.

Q. And there is an eight and nine candle holder?

A. The eight and nine are really the same thing. There are eight lights used for Hanukkah. There is a tradition, which is really a tradition of more African and European Jews, of adding a candle to the candelabrum for the purpose of lighting the eight candles which are obligatory. The ninth is, as it [95] were, a match.

THE COURT: Let me interfere a minute. I need all the education I can get, but it seems to me that we might be educated all afternoon here.

Can I assume for purposes of this case that the Menora is a religious symbol, although it also may be a cultural symbol? Because I think you gentlemen might talk together, and it's interesting and it's educational, but we have time constraints of some degree.

MR. SPECTER: I agree, Your Honor, and I certainly will say that I did not intend to protract this cross examination. However, I would be willing to agree that it is both a cultural and religious symbol, in part.

MS. LITMAN: Your Honor, it is our position, as I understand Rabbi Staitman's testimony, according to the vast majority, the greatest number of adherence to the Jewish religion, those people would take the view that is a religious symbol. It is only among a group that Rabbi Staitman referred to as some independents who might have some independent thought within the community that there is some notion that it is cultural, but it has no significance outside of the Jewish religion and belief. It is a religious symbol.

THE COURT: The Rabbi said that there are people who look at it as a cultural symbol, some who look at it as religious symbol, some who look at it as both. I suppose it [96] depends on the philosophy of the person looking.

MS. LITMAN: Of course, that's true, and naturally—

THE COURT: And I suppose that's true of the Nativity scene as well. People have different attitudes about what it means to them. But for purposes of our proceeding here today, could we agree that it's a religious symbol to some and a cultural symbol to others?

MS. LITMAN: Only, Your Honor, I could agree if we talk a cultural symbol, a Jewish cultural symbol. It has no other meaning.

THE COURT: Yes.

MS. LITMAN: And the others would not be a significant proportion, as I understand the Rabbi's testimony of even the Jewish community. But it would only be that it's a Jewish religious symbol.

THE COURT: I don't want to interfere with Mr. Specter's cross examination. It's not good for a Judge to interfere with cross examination. I'm simply seeking some concensus. But go ahead, and I'll try to keep quiet.

MR. SPECTER: Okay. And I'll try to move quickly, Your Honor.

Q. Rabbi Staitman, is the Menora, Hanukkah or otherwise, an object of worship?

A. Judaism has no objects of worship. We consider objects of worship to be heretical.

[97] Q. Would you say it is a symbol of a type which would symbolize a religion?

A. Unquestionably.

Q. Could you compare it to any symbol commonly used in any aspect of the Christian religion?

A. Well, I think that it is comparable to a creche in the following sense. The creche is a symbol of what Christianity believes to be the miracle worked by God, his appearance on earth in human form. The Menora is a symbol to the Jewish people of the miracle worked by God in either the recapture and dedication of the temple, or the oil lasting for eight days. So in that sense I think they are comparable symbols, that they both represent what we perceive to be miracles.

Q. Could the lighting of the candles be carried out and the tradition properly followed if the candles were not placed in a Menora?

A. They can be.

Q. In other words, they could be, if something would hold them up they could sit on this bench right here?

A. Yes, they could.

Q. And the lighting of them would constitute proper observance of the holiday?

A. No, it would not constitute proper observance.

Q. Why is that?

A. The candles must be placed such that they are visible to [98] the general public, as a proclamation to the public of the miracle, and therefore, the Menora traditionally is placed outside the door as you face the door to the left-hand side. Now, if one lives in a domicile such that you can't do that, then the tradition is to place the Menora in a window, such that it can be seen by the general public.

Q. You have testified, I believe, in essence, if not in fact, that the lighting of the candle is a religious act?

A. That's correct.

Q. Would it be a religious act if it were not lit by a Jewish person?

A. It has no status whatsoever. Let me explain what I mean. To fulfill a mitzvah is what we mean by religious act. In other words, to do that which we perceive to be divinely required. It is not a devine requirement for a non-Jew to light the Hanukkah Menora. Therefore, it's not seen as a religious act if a non-Jew does it. It is obligatory for Jews to do it. I don't know if that answers your question.

Q. Yes, I think it does.

Have you personally viewed the Menora in past years which has been displayed on the steps of the City-County Building?

A. I have.

Q. Do you know by whom the candles over the years have been lit?

A. I do not.

[99] Q. But your testimony would be that if they were lit by non-Jews, that such lighting would not constitute religious acts?

A. That is correct.

MR. SPECTER: I have no further questions.

MR. McTIERNAN: No questions, Your Honor.

THE COURT: Any redirect?

MS. LITMAN: Just a couple of questions, Rabbi Staitman.

REDIRECT EXAMINATION

BY MS. LITMAN:

Q. One, have you ever heard of Hanukkah being declared a general secular holiday in the United States?

A. No.

Q. If Jewish people wanted to see a Hanukkah Menora, can you tell me whether they would have, are there Hanukkah Menoras available to them outside of the one that's on the City-County Building?

A. Yes. There are at least three which are lit, four which are lit publically. One stands on top of the Yeshiva Achei Tmimim and is visible from the Parkway. One stands in front of the Nahama Minsky school for girls and is visible at the corner of Wightman and, I believe, Hobart. One stands in front of the Temple Sinai, which is on Forbes Avenue, and there is one in front of the Hebrew Institute also on Forbes Avenue.

Q. And in addition to those, are there Menoras available, and, [100] in fact, used, to your knowledge, by Jewish people in their homes in the Hanukkah season?

A. Yes.

MS. LITMAN: No further questions.

MR. SPECTER: No further quesitons.

MR. JANOCSKO: No questions.

MR. LITMAN: May I have just a moment, Your Honor.

THE COURT: I think that sunlight is bothering some of the people, Mr. Finkelstein. Would you have Mr. Duffy close the blinds up there.

MS. LITMAN: Your Honor, the plaintiff rests.

Oh, I'm sorry, if I may, Your Honor, there is one further thing, if I may. I spoke too quickly.

I would like to merely state, for the record, an admission which comes by way of a subpoena directed to each the defendants, and their response to the subpoena. A subpoena was directed to and served upon the County of Allegheny, demanding that certain documents be brought, to-wit: All records regarding the erection, storage and maintenance of the Nativity scene now on display at the County Courthouse, and the defendant, through its counsel, has advised me there are none.

Similarly, Your Honor, a subpoena was directed to the City of Pittsburgh, and it demanded that the following documents be produced: All records regarding the erection, storage and maintenance of the Menora displayed December 18, 1985 in or [101] about the City-County Building. And similarly, the City has responded, there are none.

Now the plaintiff rests, Your Honor.

THE COURT: All right. We'll mark the testimony closed for the City, or rather, from the plaintiff.

Now, you gentlemen wish to call anyone? Mr. Specter.

MR. SPECTER: Your Honor, at this time we respectfully move the Court to deny plaintiff's motion for a preliminary injunction and/or application for restraining order. And if the Court please, although this has not been the subject of prior discussion, it seems to me that under the circumstances, prior notice having been given, et cetera, that under the rules and applicable law, this is probably a hearing, a plaintiff's motion for preliminary injunction, although I don't know it makes much difference insofar as the law is concerned.

THE COURT: This is hearing on motion for preliminary injunction. The record shows that I made an order that we would hear the motion for preliminary injunction today. Both sides are represented. Testimony has been heard. So, I treat it as a motion for a preliminary injunction.

MR. SPECTER: Okay, Thank you, Your Honor.

It appears to the City that under applicable law the plaintiffs have not satisfied the burden necessary to mandate issuance of a preliminary injunction. Does Your Honor want to hear some argument, or how—

[102] THE COURT: Well, lets see what the County wants to do here. I take it this would be a motion that you would make in the nature of a motion for directed verdict on the grounds you have not heard enough evidence introduced to create the violation of the Establishment Clause; is that your theory?

MR. SPECTER: That is correct, Your Honor.

MR. McTIERNAN: I would join—

THE COURT: I deny your motion. You could still introduce testimony.

MR. SPECTER: That is correct.

THE COURT: What is your position.

MR. McTIERNAN: At this time we join in the City's motion to dismiss under the rules for directed verdict. That was the understanding. We do have witnesses.

THE COURT: You gentlemen have testimony, in the event that I deny your motions?

MR. McTIERNAN: Yes, Your Honor.

MR. SPECTER: Frankly, I've not yet decided, Your Honor. I do have witnesses present, but I have not determined whether to call them.

THE COURT: Well, I understand the nature of your argument. I'll let you argue briefly whatever you want to put on the record here.

MR. SPECTER: I promise it will be very brief, Your Honor.

[103] Plaintiffs are required to make a clear, I emphasize the record, clear showing to their right to a preliminary injunction. Among the facts in law taken into consideration in, by the Court in determining whether to so exercise its discretion is, No. 1, whether there are any facts in dispute. And we respectfully submit that there are substantial facts in dispute. By way of example, there has been substantial testimony indicating that the display of the City includes not just the Menora, but in fact, includes a Christmas tree, which is not the subject of any dispute in this case, and to my knowledge, is not, has not been the subject of dispute in any of the recent Supreme Court's or Circuit cases addressing this issue generally. So, we have in the case of the City a general seasonal display, which as I

will indicate very briefly, has been consistently upheld by the Federal Courts within the last few years as this question has come more and more to the floor. We know that there are factors for which two of which are mainly significant here which lead the Court to determine whether a preliminary injunction ought to issue. One, of course, is the significance of the threat of irreparable harm, if, in fact, there is irreparable harm to the plaintiffs if the injunction is not granted.

I point out to the Court that in the case of the Menora, it has been placed in its location in the front of the City-County Building each season for approximately five years. I [104] do not know how long the creche has been present in the County Courthouse, and that's not my part of the argument. But in any event, these displays have been long existent, and I suggest five years is a sufficient amount of time to which the word "long" may be applied. There has been no litigation, no public complaints, other than the complaints to which Miss Doyle testified regarding the Menora in this five year period. If fact, if you will recall her testimony on cross examination, she admitted that, in fact, this proposed lawsuit had been under consideration for approximately one year. It was at a Board meeting of the ACLU in October of this year that the Board determined that it would consider, and at that time approve the institution of this suit. Nevertheless, it was not until November 13th of this year Mrs. Doyle wrote to Mayor Caliguiri and asked that the Menora not be placed in front of the City-County Building. Five days later, by letter of November 18th, the Mayor responded to her. We may assume she had his response, the mails being what they are, probably by the 19th or 20th of November. Despite that, this suit was not instituted until, I believe, December 10th, and was probably served upon us late, not probably, but in fact, was served upon us by hand delivery last Wednesday, very late in the day, I would say, approximately 5 o'clock. Two days

later we were served with a summons, the traditional summons, which advises us we have 20 days in which to answer it. I will [105] tell the Court that the application for temporary restraining order and the motion for preliminary injunction were served concurrently last Wednesday evening with the complaint. Nonetheless, the import of all this is that a substantial amount of time has gone by, and we draw closer and closer to the time when the Menora would traditionally be erected. The essence of this is there has been delay, and when there is substantial delay there comes into question laches, and where, in fact, under the circumstances a preliminary injunction, one of the most predominant cases in the law ought to be exercised.

Now, what are the others. There are several, but one of the most important is there must be a reasonable probability that the plaintiffs will succeed on the merits. I respectfully suggest to the Court that the plaintiffs having rested, that reasonably, probably has not been substantially evidenced, if at all. No one, including I, has discussed the applicable law in this case, and as I promised the Court, I would not be protracted, but will only point out that there is, or was, two years ago, the case of Lynch v. Donnelly, which held that a creche in the context of the overall Christmas season, surrounded in a public forum by other indicia of Christmas, such as toys and Christmas trees and Santa Claus figures, et cetera, was appropriate. Circuit courts have held the same. Under the circumstances, and under all of the facts adduced [106] by plaintiff, and taking into consideration such admissions which may have been made in cross examination, we suggest that there is not a reasonable probability that they will succeed on the merits, and therefore, that at this point the Court should deny the application.

Thank you.

THE COURT: I suppose you adopt the same argument for the County?

MR. McTIERNAN: Yes, Your Honor.

MR. PUSHINSKY: Does Your Honor care for a response?

THE COURT: I don't think it will be necessary, because I'm going to deny the motion for dismissal at this time. I think we ought to hear the witnesses that these gentlemen wish to call, at least briefly.

Let's take a five-minute recess, and then we'll complete the record.

(Court recessed at 3:15 o'clock p.m.)

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(Court reconvened at 3:26 o'clock p.m.)

THE COURT: All right. Let's come to order, ladies and gentlemen. Let's let the defendants here proceed in any order that they wish.

Who would like to proceed first?

MR. McTIERNAN: We'll begin first, Your Honor, Allegheny County.

[107] Mr. Thomas.

MS. LITMAN: If the Court please, the plaintiffs request an offer of proof at sidebar.

THE COURT: All right.

(Sidebar conference was held on the record:)

MR. McTIERNAN: Your Honor, Mr. Thomas will testify he's the Director of Communications for Allegheny County, that for approximately 18 years he's made the

Christmas carole program, that the Nativity scene is part of the Christmas program that he plans, and he's familiar with the circumstances, you know, surrounding the Nativity scene, and basically state the County doesn't own the Nativity scene and various, he'll explain the circumstances of how it's erected, how it comes to be there, and he will basically explain about the courthouse area and how this particular area is used for a great number of ceremonies and other cultural events, and basically put the Nativity scene in the context of a holiday celebration, along with other aspects, such as high school choirs and things of that nature.

MS. LITMAN: Your Honor, two things I'd like to ask. Counsel says the witness will testify to the circumstances surrounding the display, the erection of the Nativity scene, but I didn't hear him say what those were that the witness is going to testify.

MR. McTIERNAN: Do I need to go into detail?

[108] THE COURT: All right. We'll let him testify. I assume you don't object?

MS. LITMAN: The other thing is, with respect to the fact that the courthouse area is used for a great number of other events. Your Honor, I don't think that's relevant to anything involved here. I'd like to know on what issue the County offers that, because it appears to me not to be relevant.

MR. McTIERNAN: It will be very brief. In the Scarsdale case, in the Second Circuit, it appeared to be important to the Court there was access by a number of community groups to the area involved. We don't feel that that's under the Lynch case.

THE COURT: I think it lays the groundwork for an argument that the courthouse is used repeatedly for activities of various kinds. I don't know that it's relevant either, but we'll let him talk.

MS. LITMAN: Thank you, Your Honor.

(Sidebar conference was concluded.)

GEORGE N. THOMAS, having been sworn, testified as follows:

DIRECT EXAMINATION

BY MR. McTIERNAN:

Q. Mr. Thomas, will you state your full name for the Court.

A. George N. Thomas.

Q. And your business address?

[109] A. 409-A County Courthouse, Department of Communications.

Q. How are you employed, Mr. Thomas?

A. I'm Director of Department of Communications.

Q. How long have you held that position?

A. 18 and a half years.

Q. Could you state briefly for the Court your educational background, and what your duties are as Public Director for the County.

A. Graduate degree from Waynesburg College, a Graduate degree in communications. My duties as Director of Communications, which was formerly called Public Information, is we are the conduit between the County government and the public, through the news

media with whom we deal every day. We prepare proclamations, resolutions, we write news releases, take photographs, cut lines for distribution. We prepare ceremonies, dedications, ground breakings of all sorts and so forth. General public relations work.

Q. And your capacity as Director of Public Relations, are you familiar with the area known as the courthouse forum and grand staircase?

A. Yes, I am.

Q. Could you explain briefly to the Court where that is in the courthouse and what it is?

A. It's on the first floor of the courthouse, which used to be the main entrance to the courthouse before they cut down [110] Grant Hill. That used to be the main entrance to the courthouse. It is now the first floor, and you have to take an elevator or steps to get there. It is the, it is the main, main most beautiful part of the courthouse, I would say. It's called the grand staircase.

Q. Do you have any involvement in planning any Christmas ceremonies for the forum, in particular, the grand staircase area?

A. Yes.

Q. What are the nature of these ceremonies or celebrations?

A. Well, annually since 1968 when I first joined the County government it has been my department's responsibility to plan and schedule the events taking place there two or three weeks prior to Christmas.

Q. What exactly are those, Mr. Thomas?

A. We begin in September by arranging for choirs to come and sing. We, we have, we generally, it becomes

kind of traditional that the director of the choir at Quaker Valley High School, because of his knowledge of the best choirs in the County among high schools, would invite certain schools to come, and from there it grew into community groups. We now have the senior citizens and girls scouts and various groups. Most of them are, however, high school choirs.

Q. How often do they perform, Mr. Thomas?

A. They perform daily during the weekdays, during the lunch [111] hour. Sometimes some days we have one choir, sometimes we have two, because of the demand, the popularity the program has drawn. We started off in 1968 with about six or seven choirs. Now we have them, we have to schedule double headers, so to speak, because so many of them want to come and sing on the grand staircase and have their picture taken.

Q. Is the staircase the only program that the choral program has, groups program?

A. That's right. We lack the rotunda area, like the City-County Building. It's the one place, it's the most beautiful place in the courthouse, with all the arches and so forth, and it is the most public place to do it.

Q. You're talking about the courthouse now?

A. The courthouse.

Q. Is there any place else in the County that these choirs perform?

A. They also perform at the Greater Pittsburgh Airport. Many of them sing at the courthouse first, and then go to Greater Pitt and sing in the rotunda of Greater Pittsburgh Airport.

Q. Has your department prepared a schedule for the 1986 Christmas?

A. Yes, we did.

Q. I have a document that's been marked as Defendants' Exhibit No. 2. Could you identify that for the record.

[112] A. Yes. Yes, this is our schedule for 1986, beginning with December 3rd, and culminating on December 23rd, with the St. Raphael Elementary School band, from whom Father, whatever, I forgot the Father's name, it's his elementary school band that is performing on the 23rd.

Q. There appear to be two sheets in the exhibit.

A. That's right. The first sheet is the courthouse schedule and the second one is Greater Pitt Airport.

Q. So, the first sheet would indicate the groups that are performing there on a day to day basis?

A. That's right.

Q. At the courthouse grand steps; okay. Does your department issue any press release with respect to the choral program and its purpose?

A. Yes, we do.

Q. Did you issue one?

A. Usually Thanksgiving week we announce the schedule for both the airport and the courthouse.

Q. Let me show you an exhibit that's been marked Defendants' Exhibit No. 3, Mr. Thomas. Are you familiar with that?

A. That's right. It's the news release we issued to the news media on November 20th.

Q. Is that the exhibit that you released for this year's program?

A. That's right. Every consecutive year—

[113] Q. Does the press release discuss the purpose for the program?

MS. LITMAN: Before the witness testified as to the press release, may I have a moment to read it?

THE COURT: All right.

MS. LITMAN: Thank you.

THE COURT: We all set to go ahead?

MS. LITMAN: I just need one moment, Your Honor. I'm sorry. Go ahead, Your Honor. I can't find it.

Q. Mr. Thomas, has the choral program been dedicated to any religious or secutarian purpose this year?

A. No, sir. It's always been dedicated to world peace, brotherhood, and to the prisoners of war, or the men missing in action and their families.

Q. And is that reflected in the press release that you've issued?

A. Yes, it is. And we always ask the Minister who's going to give the invocation to dedicate it to the families of the prisoners of war and men missing in action.

Q. Just briefly, why is the grand staircase chosen for this particular program, Mr. Thomas? I think you referred to it previously.

A. It's the most beautiful part of the courthouse, with its arches and stairway, grand stairway.

Q. In addition to the arches and the stairway itself, what's [114] the setting for the choral program?

A. When?

Q. Where the choirs will stand, or, you know, is there any decoration or any setting that's prepared for the choral groups to use?

A. By us, or by someone else?

Q. Well, generally, what is it, not what you necessarily do, but what is it generally?

A. There's usually a Nativity scene, then there are Christmas trees, evergreens with red ribbons, poinsettias of both red and white, various, various other decorations, all cultural programs department, which is to add.

Q. I have a series of photographs marked as Defendants' Exhibits 4 through 7, Mr. Thomas.

MS. LITMAN: Can you just give me a moment.

THE COURT: We better mark yours A through whatever letter is that you come to the end on, because the plaintiffs are numbered; aren't they?

MS. LITMAN: Yes, Your Honor.

THE COURT: So, let's call this, A, B, C, D, E, F, G.

MR. McTIERNAN: You want to renumber the entire set, Your Honor?

THE COURT: You don't need to renumber the entire set. That's just what we'll refer to them as. You can renumber [115] them later.

MR. McTIERNAN: Okay.

Q. Do you know how these photographs came into existence, Mr. Thomas, when they were taken, or who took them?

A. Yes. They were taken Friday afternoon.

Q. And who directed them to be taken?

A. By County photographer.

Q. Okay. Could you explain briefly what each photograph depicts?

A. Sure. This one—well, let's take, well, this one, this one first.

Q. Sure.

MS. LITMAN: That's A?

MR. McTIERNAN: Call that 4A, A. We'll refer to the first photograph as D.

Q. Could you explain what D is, Mr. Thomas?

A. D shows a medium closeup of the manger scene with the green, green trees in the background there, poinsettias surrounding it, a wreath on the back on the window in the back, and a fence around the entire scene.

Q. Could you explain what Exhibit E represents?

A. This one is taken from behind on the top step looking down onto the setting, the grand staircase, from the top.

Q. Okay. Are there any other Christmas decorations that were—

[116] A. Yes. There are several trees along the window there, under the large painting. There are poinsettias, throughout there there's the American flag in the corner. More trees, from this angle you can see more evergreens than anything else.

Q. That was the photograph that's been marked, then, Defendants' Exhibit E.

A. This one here shows, if you were standing in front of the grand staircase and look to your right you could see the current art exhibit that is off to the right, as also part of the grand staircase.

Q. Could you explain what that exhibit area is, briefly, Mr. Thomas?

A. It's called the gallery forum, and throughout the year our Cultural Programs Department arranges for various art displays. And they are, they're completely in charge of that. We have nothing to do with that.

Q. Is that in the courthouse area there?

A. Same branch, grand staircase area, it's called. And this picture here shows looking to the—

Q. The one you're referring to now is the photograph marked G?

A. G, you're looking to the left, the rest of the art exhibit.

Q. So in looking at those photographs, Mr. Thomas, do they depict Christmas decorations and art exhibits, in addition to [117] the Nativity scene?

A. Yes, they sure do.

Q. Who owns the Nativity—

MS. LITMAN: Excuse me, Your Honor. I'm not clear on whether or not there's more than a D, E and F. Has there also been a G marked?

MR. McTIERNAN: The last one referred to by Mr. Thomas was, I believe, G.

MS. LITMAN: Is that this one? I just want to be sure mine are the same as yours.

MR. McTIERNAN: Yes.

Q. Who owns the Nativity scene, Mr. Thomas?

A. The Holy Name Society of the diocese of Pittsburgh.

Q. And how long has this particular Nativity scene been used as part of the choral program?

A. Since 1981.

Q. Is there any sign in front of the Nativity scene?

A. Yes.

Q. And what does the sign say?

A. "This display donated by the Holy Name Society."

Q. Who provided that sign?

A. Father Paul Yurko of the, he is head of the Holy Name Society, and he also has a church in Ambridge. I think it's called Holy Redeemer Church.

Q. So, the sign and the Nativity scene are owned by the Holy [118] Name Society; is that correct?

A. Yes.

Q. Could you just tell us briefly what the manger display consists of?

A. It's a typical Nativity scene. There is the, there's the manger, and then there's Jesus and his mother, Mary, Joseph, the shepherds, little, little sheep, the wise men, a typical Nativity scene.

Q. And have you taken any steps to measure the size of it just for the information of the Court?

A. Yeah. The little sheep are just about three or four inches high. The tallest one is about 15 inches, one of the wise men. The rest are in between.

Q. Does Allegheny County provide any special utilities or illumination for the Nativity scene?

A. No, we did not.

Q. And does the County spend any funds for the maintenance of the Nativity scene?

A. No, we do not.

Q. Has the County had any role in storing it during the past year?

A. The last year, last two years Father Yurko asked me if we had space in the basement where we could store it, inasmuch as he was bringing it in in a station wagon, and he said it bounces around, and these are plastic figurines. He said they [119] may break. Do you have some place where you can keep them from year to year. So, I have a storage room in the basement of the courthouse, and I found a corner there not being used for anything else, so I just, I just place them there for him, and then he comes back the following December, and I give them back to him.

Q. Who's responsible for erecting and disassembling the Nativity scene each year?

A. Father Yurko insists on doing it alone. He brings straw with him, and I simply borrow a dolly. I go down to the storage room, we place the figurines on the dolly, we take it up in the elevator, and then I leave him. He does everything himself.

Q. Does anyone else handle the figurines or arrange the figures?

A. He won't let us.

Q. He insists on handling it himself?

A. Yes.

Q. To your knowledge, has the County or any County employee ever been involved in any way in erecting or disassembling the scene. You mention you haul it out on a dolly. Do you know of anything else that has or might have occurred?

A. No. Once I leave him there with everything I go back up. When I come back down later it's all set up. He does it all himself.

Q To your knowledge, Mr. Thomas, has the County ever incurred [120] any direct expense in the erection or disassembling?

MS. LITMAN: If the Court please, that's objected to. This witness is an employee of the County. His salary is a direct expense. The building is owned and maintained by the County. That's a direct expense. The storage area is now admittedly owned by the County. That's a direct expense. So, for this witness to opine something contrary to that, I think would be improper. I don't think he's competent to testify to that.

THE COURT: Well, we'll let him answer the question. You can argue that there are expenses involved, but I think he's entitled to state what the expenses are, if any, and then you can cross examine him on his knowledge. He's certainly capable of telling us what he does, and I suppose from that I can infer what the expenses are, if any.

Go ahead.

Q. You can answer, Mr. Thomas.

A. I, there's no out of pocket expenses, none.

Q. Is there any County employees stationed in the area of the courthouse forum?

A. Yes. Frank Williams is there.

Q. Okay. And is he assigned there simply to watch the Nativity scene, Mr. Thomas?

A. No, sir. He's there year round. He's part of the Cultural Programs Department, and he's there to guard the exhibits [121] the art exhibits.

Q. So, there are art exhibits there all year around?

A. All year round.

Q. Would he continue to be employed even if there is no Nativity scene?

A. Oh, yes. He's there year round.

Q. Just briefly, Mr. Thomas, are there any other Christmas decorations in addition to the Nativity scene that make up the setting for the choral programs?

A. We have loud speakers that broadcast the music of the choral groups out into the street, because our area size is so limited. There are decorations, you know, throughout the courthouse. Every department has wreaths, trees, Santa Clauses, and what have you, all sorts of decoration.

Q. Would that include the first floor of the courthouse where the staircase is located?

A. Well, throughout the first floor is, beyond the grand staircase, down the hallways, outside we have a banner that invites people to come in and hear the choral groups.

Q. Okay. Let me show you this Exhibit which is being marked Defendants' Exhibit H. You just made a reference to a banner. Could you identify that?

A. Yes. Yes, the banner—

MS. LITMAN: Excuse me, excuse me—

MR. McTIERNAN: I don't have an extra one.

[122] MS. LITMAN: May I see this one before the witness testifies, Your Honor?

THE COURT: Oh, I guess so.

Q. You were saying, Mr. Thomas?

A. Yes, this is the typical banner. We use the same, same design every year. We simply change the date, and this is an annual, we put the dates and the times, and we invite the people to come in to say happy holidays from the Christmas carol program, grand staircase.

Q. Was essentially this banner put up this year?

A. Yes, it, it was up for two weeks.

Q. Is it up right now, Mr. Thomas?

A. No, it isn't. It was taken down last week.

Q. Was it taken down deliberately?

A. No, it was taken down in error. It was supposed to stay up 'til Christmas, but was taken down prematurely.

Q. Did the County ever have any other Christmas displays on the courthouse steps in addition to the Nativity scene?

A. Yes, we used to have a live 20 foot spruce Christmas tree on the top landing of the grand staircase, until 1981, when the City Fire Department called it a hazard, fire hazard, and made us remove it. Well, they didn't make us remove it, but they said, don't put it up next year. And we then, we then turned to other decorations.

Q. So, originally had a Christmas tree in addition, but [123] you took that down out of necessity because of the fire regulations?

A. That's right.

Q. Okay. In speaking of the choral groups, again, just briefly, Mr. Thomas, does the County have any role in determining what songs the choral groups sing?

A. No, we do not.

Q. Do you know whether, to your knowledge, any of these choral groups sing any carols of a religious nature?

A. Yes, and nonreligious.

Q. There's a combination of traditional?

A. Yes, they bring their own program. We don't designate what songs or carols they are to sing or not sing.

Q. Do you take any steps to publicize the participation of various choral groups, high school groups in the choral program?

A. After they, the day they appear, we take their picture and send it to the local papers with a brief headline saying they participated in this year's Christmas carol program, and the fact that the program is dedicated to world peace and brotherhood, and the families of the P.O.W.'s and M.I.A.'s.

Q. Okay. Let me show you an exhibit marked Defendants' Exhibit I.

MS. LITMAN: Excuse me, Mr. McTiernan, this?

MR. McTIERNAN: Yes. Mark it, please.

Q.. What does it consist of?

[124] THE COURT: Well, this is the one you're showing the witness?

MR. McTIERNAN: Yes, Your Honor.

THE COURT: I just wondered whether that was so I could look at it while you were questioning the witness about I.

MR. McTIERNAN: I'll give it to you in a second, Your Honor.

THE COURT: Take your time.

Q. Could you identify that and explain what it is, Mr. Thomas?

A. Yes. This is a photo taken on December 4th of the 55 member North Allegheny High School choir, and they, they were the, I guess the second group to sing this year.

Q. And would that be a fairly typical—

A. Yes.

Q. This a typical presentation.

Let me show you another similar exhibit which has been marked J. Would you identify that please.

A. This is the North Allegheny string ensemble under the direction of Joe Feich, and they appeared December 5th the, following day.

Q. And the two exhibits you've just discussed, do they show the Nativity scene as a setting for the choral group?

A. Well, you couldn't see it here, but the orchestra—

MS. LITMAN: Excuse me, if the Court please, these [125] exhibits are not in evidence, so I don't think it's

appropriate to ask the witness to testify as to what they show.

MR. McTIERNAN: Your Honor—

THE COURT: You better move them.

MR. McTIERNAN: Your Honor, I move at this time admission of Exhibits A through J, all the exhibits identified by Mr. Thomas.

MS. LITMAN: All right. We have objection to a number of them, Your Honor. So, may I get them in order and offer the appropriate objections?

THE COURT: Well, which ones do you object to?

MS. LITMAN: I'd like to be sure that I have the correct ones, so if I could be, if I could ask counsel to show me the ones that he—

THE COURT: Here you go.

MS. LITMAN: I'll just mark mine, Your Honor, and then I'll pass them up so the Court can see the ones. Counsel has run through them very quickly, so that's why—I guess I need I. Okay. Let me give you those two. Now, what number is this one?

MR. McTIERNAN: Is that the press release?

MS. LITMAN: That's one of the press releases.

MR. McTIERNAN: That would be Exhibit C.

MS. LITMAN: The press release, Exhibit C.

MR. McTIERNAN: That's the Exhibit C, the first press [126] release.

MS. LITMAN: Let me get the photographs coordinated. Could I see D? This is D.

MR. McTIERNAN: That's right, that's D. That's E.

MS. LITMAN: Sorry, Your Honor, but when they were handed to me they weren't marked, so I just want to make sure they are coordinated.

MR. McTIERNAN: The offer is A through J. A was already admitted, then B through J.

THE COURT: Here you go. Maybe I'm holding one up here that you need.

MS. LITMAN: B and C. May I go through these one by one, Your Honor. Plaintiffs object to Defendants' Exhibit B, the Allegheny County Christmas carol program, because we think it has no relevance to the question of whether the display of the Nativity scene on the grand staircase violates the Establishment Clause. And we point out that the exhibit itself shows clearly that for the great majority of the time the creche stands certainly not accompanied by anything referred to on the items here. The record shows that the Nativity scene was put up on November 26th. This schedule doesn't even start until December 3rd. And indeed, when it does start it recites a program that takes place an hour or two a day. So we would object to B on the grounds of relevance.

[127] THE COURT: All right. We'll overrule the objection and receive B.

Next objection.

MS. LITMAN: With respect to C, Your Honor, we object that this is a hearsay statement. It has no relevance to the Nativity scene, and we would object to the hearsay aspects of it being put into evidence. The fact that there are, indeed, public relations directives sent out to the public has been attested to by the witness, and we think that the contents of this, if the defendant wishes to use it to attempt to argue what Commissioners Foerster, Flaherty

and Haver say or urge, or intend, or what their purpose is, is clearly hearsay for that purpose. So, we would object to C if it is offered for any substantive purpose other than that there was a release issued, but not for the contents of the release.

THE COURT: All right. We'll overrule the objection and receive C.

Any other objections?

MS. LITMAN: Yes, Your Honor.

There is no objection to Defendants' Exhibit D, or E, or F, or G, since we believe that those are relevant.

Where is Exhibit H?

THE COURT: Right here.

MS. LITMAN: I'm sorry, Your Honor, I don't—

THE COURT: Exhibit H is the one that has the banner [128] across the courthouse front that says, welcome to the 18th annual Christmas carol program.

MS. LITMAN: Your Honor, we would object to Exhibit H on two grounds. One, it is not visible where the Nativity scene is displayed, and indeed, the witness has testified that it is not even there at the present time. So we don't think it's relevant to the issues before the Court.

THE COURT: All right. We'll overrule the objection and receive H.

Any other objection?

MS. LITMAN: Yes, Your Honor. With respect to J and I, there seems no purpose to attaching to each of these photographs the news releases which counsel has attached, except for the purpose of attempting to admit hearsay statements into the record. So that with respect to Exhibit

I, the photograph might be argued to have some relevance, we would argue that the carolers are not relevant, but in view of the Court's ruling as to the caroling program, I can see that the Court believes that the carolers are relevant, but the first page, that is the hearsay statements contained on the first page, seems merely an attempt to get into evidence heresay declarations. And the same thing is true with respect to J.

So with respect to those, in addition to the relevance argument as to the photographs, the—

[129] THE COURT: I take it you are objecting to I and J?

MS. LITMAN: The relevance of the photographs, but the, in addition, Your Honor, the first page which is clipped on, which is a hearsay declaration, I object to on the grounds of hearsay.

THE COURT: Those are the news releases of December 4th and December 5th.

MS. LITMAN: That's right. As to those, I offer the competency objection.

THE COURT: We'll overrule the objection and receive it. They are all received.

Now, you can proceed.

BY MR. McTIERNAN:

Q. Mr. Thomas, do you regard the Nativity scene and the Christmas trees and poinsettias in the area as part of the choral program?

A. Yes, I do, as part of the entire Christmas season culture.

Q. What is the purpose of the choral program?

A. It reflects the season of the year, happiness, good will toward men, and so forth, and the fact that we remember, and the Commissioners remind me every year, remember to dedicate it to the families of the prisoners of war and the men still missing in action, and specifically supposed to be a good will program for all, for all people of all faiths. We never looked [130] upon it as any other way.

Q. What's been the public reaction to the program, Mr. Thomas?

A. Very Good. As I said, we started off with six choirs, and now we're overwhelmed with requests. The youngsters want to come in and sing in the program. We have senior citizens, we have a Jewish group coming in this year to sing. They not only sing carols, but they sing all sorts of popular songs. We have had popular, we've had popular personalities. We had Marty Allen come in and read 'Twas the Night Before Christmas. We've had the Associations, we've had the Lettermen. We've had Lenore Nemens who appeared on Broadway in the Civic Light Opera. They come in and sing popular songs and carols. It's just a happy time of year.

Q. Is the purpose, is your purpose in arranging this to endorse any particular religion?

A. No.

MS. LITMAN: If the Court please, the witness answered before the Court had an opportunity to rule on my objection, but counsel has asked the witness his purpose. Unless that reflects, unless this witness is authorized to speak for the County Commissioners, if he is the person in charge of the Nativity scene and of the surrounding area, then that might be proper, but I don't think his purpose is otherwise proper.

THE COURT: I'll disregard his statement. Is that [131] all right?

MS. LITMAN: Yes, Your Honor.

Q. Finally, Mr. Thomas, has the grand staircase ever been used for any other purpose during the year, apart from this Christmas choral program?

A. Yes. It's used periodically for various events. It's reserved for kind of major events other times. We, what it stands out to me, was the 25th celebration of the Israels winning its independence. We had a major ceremony there with all kinds of dignitaries and flags and so forth. There are sculptures there, placed on display from time to time in the same area where we have the Nativity scene. It's any, any public group that wishes to use the grand staircase for any ceremony requests the Commissioners, and if they feel that it's a good program, then they grant permission. It is a public building and the public has access to it.

Q. Thank you, Mr. Thomas.

MR. McTIERNAN: Cross examine.

CROSS EXAMINATION

BY MS. LITMAN:

Q. Mr. Thomas, are you the County employee who is in charge of the choral program and the Nativity scene area?

A. Yes, ma'am.

Q. The schedule that is worked out for the choral program, do you work that out, sir?

[132] A. I polish it off. It is worked primarily by the Director of the Quaker Valley High School choir who is

knowledgeable about the best choirs in the County. He begins in September scheduling the choirs, and then a couple of weeks before Christmas, before Thanksgiving, rather, he turns it over to my office, and then if there are any openings and other groups wish to be added, we then add them in our office, and then we type it up and redistribute them.

Q. Where is your office, sir?

A. On the fourth floor of the courthouse.

Q. And with respect to the dates that are arranged for the choirs, those are coordinated through you; is that correct?

A. That's right.

Q. So that in order to use the County Courthouse for these carols or other programs, those dates have to be coordinated through you for the County; is that it?

A. Yes, ma'am.

Q. And that's because at the courthouse there are a lot of other activities taking place; is that right?

A. That's right.

Q. Now, let me just clarify one thing. You spoke about the area for the art exhibit; you remember that? And indeed, one of the exhibits to which you testified, Defendants' Exhibit F, reflects what you described as an art exhibit in the County Courthouse; is that right?

[133] A. That's right, yes.

Q. All right. Now, the art exhibits are under the control and supervision of the Allegheny County Bureau of Cultural Programs; is that correct?

A. That's right, um-hum.

Q. And that's different from your office?

A. That's right.

Q. So with respect to the area used for the art exhibits, the dates and the material on that are coordinated by the Allegheny Bureau of Cultural Programs; is that right?

A. That's right.

Q. But the choral program, the caroling that you described, that's coordinated by you?

A. That's right.

Q. And the dates on which the Nativity scene is displayed on the steps on the staircase, your office also coordinates those dates, sir?

A. Yes, ma'am.

Q. And Father, is it Yurko, did you tell us?

A. Yurko—Y-u-r-k-o.

Q. Is it you he calls to find out what day he's permitted to come in and put up the display?

A. That's right.

Q. Or do you call him and tell him, we're going to put it up certain times?

[134] A. Whoever thinks of it first. It is also, we have to coincide with his schedule. He picks the day when he can get away. He has a parish and also has duties at his diocese.

Q. So, on some occasions you call him and say, I'd like it to be this day; is that right?

A. Well, we tell him what day the choral singing will begin, and then he sees to it that it is set up in time for the choirs to be there.

Q. Now, on this year, as I understand it from Defendants' Exhibit B, the choral programs started on December 3rd; is that right?

A. December 3rd, that's right.

Q. And the Nativity scene, then, was put up November 26th; is that right?

A. The day before Thanksgiving, yes, ma'am.

Q. And this year did you call Father Yurko to tell him that that was the date?

A. My assistant did. I was on vacation Thanksgiving week, but my assistant—

Q. Your assistant is also a County employee?

A. Um-hum.

Q. What is his or her name?

A. Mrs. Wendy Charlton.

Q. And with respect to the storage of the Nativity scene figures in the County courthouse, as I understand your [135] testimony, Mr. Thomas, it's been for the last two years that you've stored it there?

A. Yes.

Q. And you did that because it was difficult for Father Yurko to take them back and forth; is that right?

A. They are plastic. He was afraid they would break.

Q. And you had the authority to allow him to store it there in the courthouse; is that right?

A. Yes, ma'am.

Q. That's part of the authority that you have been given by the County in your job; is that right?

A. Yes, ma'am.

Q. And so, you arranged that it would be stored there in the County Courthouse?

A. Um-hum.

Q. Is that right?

A. Yes, ma'am.

Q. You have to say, "yes", because when you nod—

A. Yes.

Q. Now then—

THE COURT: He doesn't have to say "yes."

MS. LITMAN: I meant instead of nodding.

THE COURT: Just answer one way or the other so the reporter can record it. But there's no requirement that you say either "yes", or "no". And we'll let you explain if [136] you need to.

Q. Now, then, with respect to the figures being stored, are they protected in some way so that they don't get knocked around?

A. I just lay them on the shelf, put a piece of paper over them so they will be dust free, and that's all.

Q. Now, as I understand your testimony, you're the person who assists Father Yurko in putting them on a dolly and taking them to the stairs; is that right?

A. That's right.

Q. And then, you say you leave him there to assemble them himself?

A. Yes.

Q. And do you direct the people at the County, this gentleman has permission to do that, and you just let him put these figures in there, he's here with my permission?

A. Well, there's no one to tell it to. I just take him there, and here is the empty space, and I say, go to it, Father.

Q. There's nobody in the County that's watching as he puts them up?

A. Frank is over there watching the art exhibits, but he knows we do it every year. There's nobody to talk to, that's all there is to it.

Q. What do you mean when you say "he knows", don't you mean that it's now understood that Father Yurko has your permission on [137] behalf of the County to put those figures up?

A. Yes, ma'am.

Q. He has your blessing, so to speak?

MR. McTIERNAN: Objection, Your Honor.

THE COURT: I think we ought to leave the word "blessing" out of this proceeding.

MS. LITMAN: Withdrawn, Your Honor. It's withdrawn.

THE COURT: You can ask if he's authorized to let the Father store the figures.

Q. He has your authorization?

A. Yes.

Q. Okay. Now, with respect to the choral groups, isn't it a fact that they perform approximately one hour on most of the days listed, or on a number of the days listed?

A. Yes. Some 45 minutes, some an hour. We leave it up to them. They are invited to come and entertain, and whatever time they wish, sometimes they go over, sometimes they go under. We let them do their thing.

Q. Well the, the longest choral program that is here lasts from—you can kind of help me out if I'm wrong, but is the longest choral program on any day during the entire time that you have the choral programs, is the longest one from 11:00 o'clock until 1:00 o'clock; that's correct, isn't it?

A. Yes, ma'am. Yes.

Q. And during the rest of the day there is no choral program?

[138] A. That's right.

Q. But the creche, of course, is there?

A. That's right.

Q. But the creche, of course, is there?

A. That's right.

Q. And during the days when there's no choral program as indicated on Defendants' Exhibit B, the creche remains?

A. Well, the courthouse is closed on Saturdays and Sundays.

Q. No, no, during the days when there are no programs, from the time the creche is put up, November 26th—

A. Oh.

Q. —until December 3rd, the creche is there?

A. Oh, yes. If it's up, yes. He came early this year because of his schedule. He had a funeral or something, so we said, whenever you can, Father.

Q. Okay.

A. He came at his convenience.

Q. And the way that that's arranged is you have discussions with him, or he has discussions with you and your assistant, or your assistant; is that right?

A. Yes, yes. Very simple. He just calls and says, when can I come in? And we say, whenever you want to.

Q. Now, you said that the P.R. Department, as I understand it, sends out certain news releases; is that right?

A. Yes, ma'am.

Q. Were you, as the P.R. Director for Allegheny County, made aware of the fact by the Commissioners that they had received [139] a letter from the American Civil Liberties Union, telling them that the Nativity scene violated the constitution; were you made aware of that, sir?

A. No.

Q. With respect to the art exhibits, I'd like to ask you some questions. Let me direct your attention to the art exhibit that's shown on Exhibit F, and I put Defendants' Exhibit F before you, sir.

Now, do you know whose art exhibit that is?

A. I do not.

Q. You don't have anything to do with that, do you?

A. No.

Q. That's an entirely different province, sir?

A. That's right.

Q. Or bailiwick?

A. Yes.

Q. With respect to the art exhibits, though, you do know, do you not, that none of that material is stored in any way in Allegheny County?

A. I don't know. I don't have anything to do with the program, so I wouldn't know.

Q. You said that if someone wants to use the grand staircase they, they get in touch with the Commissioners; is that right?

A. That's right.

Q. And you said, in substance, that if the Commissioners [140] think it's a good program, as you understand it, they give permission; is that about fairly stated?

A. They usually call me.

Q. And you give your input?

A. I give my input. If I think it's—about a month or two ago—

Q. Well, just tell me if that's correct. You give your input?

A. That's right.

Q. Isn't it a fact that there is no written policy or guideline to determine who will be permitted to come in and use the staircase; isn't that a fact?

A. I'm not aware of it. If there are any, I'm not aware of any.

Q. You've certainly never seen any such written guideline; have you?

A. I have not seen any.

Q. And you've never seen any kind of written policy; have you?

A. I have never seen any.

Q. The staircase where the Nativity scene now is, you refer to that as the grand staircase; is that right?

A. . That's what the architect called it.

Q. And would it be fair to say that you feel that that's kind of the focal point for people coming into the County [141] Courthouse?

A. No, because the, as I said, that is no longer the main entrance to the courthouse. The main, the courthouse, County Courthouse entrance now is on the ground floor, and I'd say 90, 95 percent of the people who come in go straight to the elevators and never see the grand staircase.

Q. For people using the staircase, certainly that's the focal point as they come up the stairs; is that correct?

A. If they come up the stairs, yes.

Q. And indeed, as your own exhibit shows, it's right there to the right of that staircase that the sign shows how to get to the County Commissioners' office; isn't that right?

A. That's right.

Q. And to the Sheriff's office?

A. That's right.

Q. And on the left to the Treasurer's office?

A. They have been there a long time.

Q. Would you agree, sir, that the Nativity scene occupies at least half, or perhaps two-thirds of that stairway?

A. I disagree.

Q. You would not agree that it—

A. I would not agree it takes that much of a space, no, ma'am. It's only, I think, five feet. The back of it, we walked it off, about five feet. The front is about three feet. It stands about three and a half feet high. The manger scene [142] itself, then we have a fence around it to protect the plants, the poinsettias and the evergreens and so forth from people stomping on them. But the, the manger set itself is only about five-by-three-by-three and a half. It's very small.

Q. Mr. Thomas, in terms of how much of the staircase one can use, would you agree that the Nativity scene, together with the framing normal arranagements around it, occupies over half of the stairway?

A. Don't forget, we have two stairways. We have a lower, and then a platform, and then the upper stairway.

Q. Okay. Focusing—

A. It occupies maybe, maybe a half of the lower staircase, but none of the upper, the upper, the level part and the next, the next level up. I think you can see that in the head on, in the other shot. This, I have a poor angle here. This is a side angle.

Q. With respect to the lower staircase that is, that the Nativity scene is on, we are agreed that it, together with the surrounding floral arrangements, occupies about half; is that right?

A. Of the lower area.

Q. Okay. When you testified that Father Yurko, I think you said, won't let us help, who was the "us" whom you were referring?

A. Well, any of my, any of my staff. Just two of us.

[143] Q. You've offered your services, I take it?

A. To put it up?

Q. Yes.

A. No way. It's too fragile. I wouldn't want to crack one of those.

Q. When you say "it's fragile", isn't it, aren't these figures the type that are mass produced, sir?

A. They may be mass produced, but I bet they are expensive.

Q. When you say you bet they are expensive, do you have any basis for saying that?

A. No, just seeing them in religious stores.

Q. You haven't priced these; have you?

A. No, ma'am.

Q. Isn't it a fact that from time to time County carpenters help in little things that have to do with the manger itself, or the railing?

A. I have never seen anybody help there.

Q. Do you have any reason to believe that County carpenters have helped from time to time?

A. I can't presume, no. I, as I said, I go back to my office when he arrives.

Q. My question was, do you have any reason to believe that County carpenters have helped with the manger or with the railing around it?

A. I would have no reason, because they are not in my [144] jurisdiction.

Q. In fact, you don't know what the County carpenters or the other employees who are not in public relations do at all; do you?

A. No.

Q. Now, you talked about Santa Clauses in the courthouse; is that correct? You talked about them?

A. Yeah, different—

Q. Isn't it a fact that on the grand staircase, and in this area, there is no Santa Claus; isn't that true?

A. This year there is no Santa Claus.

THE COURT: She means—

MS. LITMAN: I mean in a figure, Your Honor.

THE COURT: Not in the spirit of things, but in reality.

THE WITNESS: The spirit is there.

Q. You are agreed—you would agree in this area there is no replica or figurine of Santa Claus; is there, Mr. Thomas?

A. Not this year, that's right. There are wreaths, there are wreaths on the window and evergreens.

Q. You said that the Commissioners remind you every year to remember to dedicate the choral program to the families who have people missing in action; they remind you of that every year?

A. That's right, because one year we put the pictures of all [145] the men, the prisoners of war and the men missing in action that the family brought in, we put them around in front of the creche and offered prayers for their safe return.

Q. What year was that, sir?

A. In the '70's.

Q. And who offered the prayers, sir?

A. Who, what—

Q. One year the County put up photographs of the men, you say, who were missing in action, and prayer was offered before the Nativity scene for the safe return of all those men; is that what you said, sir?

A. The prayers were offered—

Q. For the safe return?

A. —for their safe return.

Q. And those prayers were before the creche; isn't that what you said, sir?

A. Well, before the creche, they were over the microphone.

Q. Didn't you say that the prayers were there before the creche; isn't that what you said?

A. In the area.

Q. Isn't that what you said, Mr. Thomas?

A. No. It was an area in front of the creche, separate from it, in which the prisoners of war families, and men missing in action put their loved ones pictures, because we dedicated, we annually dedicated the Christmas carol program to their [146] safe return.

Q. And it was in that area that prayers were offered; is that correct?

A. That's right.

Q. And that was with your authorization and approval; was it not, Mr. Thomas?

A. I arrange it, yes, ma'am.

Q. For most of the year the grand staircase is used as a staircase; isn't that correct?

A. Most of the year, yes, ma'am.

Q. Now, you said that it's been used for sculptures; has it?

A. Sculptures.

Q. On the staircase?

A. Yes, ma'am, yes.

Q. What is the last sculpture that you can recall being placed on the staircase?

A. You'd have to ask the cultural programs people.

Q. That has nothing to do with you; is that right?

A. That's right.

Q. So that the extent there may have been sculptures in that area, you yourself are not the person who arranges that?

A. That's right.

Q. And you don't really know about that?

MR. McTIERNAN: Objection. The witness testified he did see it.

[147] THE COURT: Well, let him speak for himself.

A. I have seen them from time to time, but I made no note of it. It's not my department's responsibility.

Q. It has nothing to do with your department?

A. That's right.

Q. It's the department, the Cultural Department?

A. Cultural Programs.

Q. And if I would want to know about that information I'd have to ask the Cultural Department?

A. That's right.

Q. You don't have any kind of record of that?

A. I do not.

Q. And if I'd want to know about the carpenters and whether they do work on the manger, that again, that's not your department?

A. That's right.

Q. Is it correct that it was some time after the Nativity scene was put up on November 26th that the poinsettias were brought in to frame it, around it?

A. Well, I imagine it was in a day or two. That's traditional. Again, Cultural Programs brings those in, and they can't bring them in until the set is there.

Q. When you say "they"?

A. Cultural Programs.

Q. With respect to the poinsettias, isn't it a fact that the [148] County pays for those?

A. I don't know. That's not, again, not my area. See, I don't know their responsibilities. You'd have to ask Cultural Programs.

Q. Isn't it a fact that the County employees place those around the Nativity scene?

A. I don't know. I've never seen them placed there.

MS. LITMAN: I don't have anything further, Your Honor.

THE COURT: Any redirect?

MR. McTIERNAN: No, Your Honor.

THE COURT: I guess they are through with you. You can step down.

Shall we quit 'til morning? What is your pleasure here?

MR. McTIERNAN: Your Honor, we'd be willing to continue. We only have two more witnesses, perhaps only one if we can get some stipulations from plaintiffs' counsel. It's up to the Court's pleasure.

MR. SPECTER: If the Court were agreeable, my inclination would be to finish today.

THE COURT: Well, it's not very, it's very definitely my pleasure. I guess I have help to consider here. How much longer do you think you'll take? I anticipated that you'd be arguing to me at least for 10-15 minutes.

Well, let's go for a few more minutes here and see how much [149] headway we make.

Go ahead and call your next witness.

MR. JANOCSKO: Call Mr. Hairston.

EUZELL HAIRSTON, having been sworn, testified as follows:

DIRECT EXAMINATION

BY MR. JANOCSKO:

Q. Would you state your name for the record.

A. Euzell Hairston.

Q. And what is your business address?

A. 225 Courthouse.

Q. And are you employed by the County of Allegheny?

A. I am.

Q. And in what capacity?

A. Director of Property and Supplies.

MS. LITMAN: Excuse me, I'm sorry?

THE COURT: He said he's Director of Property and Supplies.

MS. LITMAN: Thank you, Your Honor.

Q. You'll have to keep your voice up so that we can all hear you.

And what are your chief duties and responsibilities in that capacity?

A. I'm the landlord for all the County properties downtown.

Q. And as the Director of the County Department of Properties [150] and Supplies, are you familiar with both the City-County Building and the County Courthouse?

A. I am.

Q. And where are the courthouse and the City-County Building located in reference to one another?

A. The court, they are both on Grant Street. The courthouse is east on Grant, the City-County Building is west on Grant.

Q. And as the Director of the County Department of Property and Supplies, are you familiar with the arrangements between the City and the County with respect to the use of the City-County Building?

A. I am.

Q. And could you just generally describe that arrangement?

A. It's very simple, 50/50. Everything is 50/50, everything on the east side, if you go into the City-County Building, everything on the east side is the County and everything on the west side of the City County Building is the City.

Q. How many entrances are there to the City-County Building?

A. There's two main entrances, and total you have two, one on Ross, one on Grant, one on Forbes.

Q. And could you please tell us who is responsible for the maintenance of the Grant Street entrance to the City-County Building?

A. The City of Pittsburgh.

Q. And who is responsible for the Ross Street side?

[151] A. Allegheny County.

Q. Now, Mr. Hairston, are there any holiday displays that had been erected on the Grant Street side of the City-County Building?

A. Yes.

Q. And what are they?

A. Big Christmas tree.

Q. And could you tell us, to your personal knowledge, who erected the Christmas tree?

A. The City.

Q. And to your knowledge, were any County employees involved in the erection of the Christmas tree?

A. No.

Q. Have you generally been aware that a Menora has been erected on the Grant Street side of the City-County Building in past years?

A. Yes.

Q. And at the present time is there a Menora erected in that area?

A. No.

Q. In the past years who erected the Menora?

A. The City.

Q. To your knowledge, have any County employees been involved in the erection of the Menora in past years?

A. No.

[152] Q. If a Menora is erected this year, will any County employee, to your knowledge, be involved in that?

A. No.

MR. JANOCSKO: No further questions.

CROSS EXAMINATION

BY MS. LITMAN:

Q. Just one thing. I wasn't sure I understood your testimony, Mr. Hairston. Did you say you're the landlord for all the County property downtown?

A. Yes.

Q. Do the tenants in the building, in the City-County Building, do they pay rent?

A. What tenants?

Q. Well, are there tenants who pay rent?

A. Part of the City-County Building belongs to the City, part belongs to the County.

Q. Are there any tenants in the part that belongs to the County that you know of that pay rent?

A. No.

Q. Are there tenants in the part that belongs to the City that you know of that pay rent?

A. You'll have to ask the City.

Q. You don't know about that?

A. No.

Q. Do you have any tenants in the courthouse?

[153] A. No.

Q. The shoeshine person, is that a tenant?

A. No, he's not a tenant.

Q. He's just there by permission; is that it?

A. (Nods.)

MS. LITMAN: I have no further questions.

MR. JANOCSKO: Your Honor, our final witness would be Maura Minteer, who is the Director of the County Bureau of Cultural Programs. She would testify to the effect that as part of her general responsibilities as Director for that agency, they oversee the area known as the courthouse gallery forum. And in that area during the past several years a number of art displays have taken place.

She will also testify to the fact that her agency has no role in providing for, arranging, maintaining or disassembling the particular Nativity scene that's at issue here.

She would also testify that she has no role in arranging for the choral program.

She would testify that the agency does obtain the poinsettia plants and the Christmas trees that are present in the displays that have been depicted in the photographs.

Finally, she would also testify to the effect that the, her department has an employee who is stationed in the forum gallery area, and that he is stationed there throughout the year.

[154] Are you willing to stipulate Counsel?

MS. LITMAN: Oh, I didn't know, Your Honor, that I was being asked to agree to a stipulation.

As I understand it, the forum gallery area is an area that sort of adjoins on the other side of the landing.

THE COURT: Let me interrupt. It oftentimes takes longer to get a stipulation than to listen to the testimony. Let's call the witness and let's let her talk.

MAURA L. MINTEER, having been sworn, testified as follows:

DIRECT EXAMINATION

BY MR. JANOCSKO:

Q. What is your full name?

A. Maura L. Minteer.

Q. And what is your business address?

A. 1520 Penn Avenue, Pittsburgh, 15222.

Q. Are you employed by Allegheny County?

A. Yes.

Q. And in what Capacity?

A. I use—you said I was Director of Cultural Programs. My actual title is Manager of Bureau of Cultural Programs.

Q. I stand corrected.

A. That's all right.

Q. And for how long have you been employed in that capacity?

A. Since March, 1986.

[155] Q. And could you very briefly describe the purpose of the County Bureau of Cultural Programs?

A. Sure. The Bureau is, was established in 1980 by the County Commissioners at that time to work in cultural areas, to serve the need, the special needs and interests of Allegheny County Government, as well as to make performing and visual arts accessible to the community, the residents of Allegheny County.

Q. Now, as the manager—

MS. LITMAN: Excuse me, if the Court please, I certainly agree that the witness is going to say all that Mr. Janocsko asked. I would just like the opportunity to cross examine the witness to define the appropriate area. I mean, if he doesn't want to go through the testimony, I assume that he's correctly recited what she would say.

THE COURT: I guess this amounts to calling the witness for cross.

Do you have any objection?

MR. JANOCSKO: No.

THE COURT: All right. Go ahead, Ms. Litman. Your witness.

CROSS EXAMINATION

BY MS. LITMAN:

Q. Ms. Minteer, with respect to the area that has been referred to as the courthouse gallery forum, I'd like to put [156] before you Defendant Exhibit G which is a photograph of that of that area, and ask you whether the art exhibit which is shown is part of what comes under your work as manager?

A. This exhibit here, yes.

Q. You're pointing, when you say "this exhibit here", are you pointing to the canvas board towards the left side of the photograph Exhibit G?

A. Yes.

Q. That bear painting on them?

A. Yes. We also do, I think there was a question asked about the poinsettias and the Christmas trees. We do do that. We decorate that area of the courthouse for Christmas as well.

Q. At Christmas?

A. During the holiday season.

Q. Well, during that season in December through January. But aside from your decoration of the area around the Nativity scene, during that Christmas season, is it correct that the art exhibits start with that part of the courthouse that's shown on Exhibit G, the wall there that has the canvas boards; is that where the art exhibit area starts?

A. This particular exhibit is exhibited in that area that, if I can get, I think we would also be on this side. It goes both.

Q. Let me show you, it's on that area and on Exhibit E, does it, does it continue around to the front wall of the [157] courthouse?

A. Yes.

Q. And then similarly, does it extend over to the wall that would be open?

A. Yes.

Q. The wall that we can see on Exhibit G?

A. Yes.

Q. And the area, then, where you actually exhibit art, is it correct that that portion of the courthouse there does not encompass the staircase where the Nativity scene is shown?

A. In the particular exhibit, no, but other times, yes.

Q. Okay. But in the exhibit that's up there now?

A. At this particular time, no.

Q. Okay. Now, with respect to the staircase itself, and the place where the Nativity scene is, Mr. Thomas has described that as the most beautiful portion of the courthouse; did you hear that testimony?

A. Yes.

Q. Would you agree?

A. I haven't seen all, I haven't seen the entire courthouse, but it, it's a beautiful place to display art. It's correct. The stairway is a grand stairway.

Q. Now, with respect to the art exhibits that are displayed in your area, is there some written policy that governs what art will be permitted to be displayed there?

[158] A. Not what art. There's a policy, we have a, had a brochure printed in the time of the opening of the gallery that sort of expressed the purpose of the gallery forum. Not necessarily censoring, not saying specifically, we will have this kind of art and not that kind, but explaining the purpose of the gallery forum, why they developed it in the first place. There is also a written statement of responsibility. A lot of times the art that is exhibited there is, is coordinated with other art, art in other rooms, and we have in writing a statement of responsibility of what the County is willing to be responsible for, and what we hope they would be responsible for.

Q. Now, when you say the policy that was expressed in a written brochure, have you a copy of that brochure?

A. I personally—

MR. JANOCSKO: I have a copy. I'll provide it to you.

Q. Now, if someone wants to exhibit in the gallery do they get in touch with your department?

A. Yes.

Q. And is anyone who wants to exhibit permitted, then, to come in and put up art?

A. Connie Kerr, who is the Director of the gallery usually kind of has the final say. She has a plan of things that she has developed and worked out, and then, she certainly considers anything that comes up. There has been cases in the [159] past, I don't know, I don't know if I can bring them all forward. I wasn't there at the time. But there's been cases that things people would have like to have censored out and didn't.

Q. Well then, is it correct that anyone is permitted to exhibit there?

A. There would have to be some kind of a quality established. It couldn't be anyone just walking in with a photograph. Usually a theme is chosen.

There's also a copy of a list of each exhibit since the opening of the gallery. So, there's a theme chosen. Sometimes there are jury exhibitions and there's a jury involved that choose which pieces of art will be presented.

Q. When you say "quality", are you talking about quality in terms of works of art?

A. Quality in terms, I guess I am. I'm talking about what, whoever designed that particular theme, what the theme is, does the piece fit.

Q. Have you seen the Nativity scene, Ms. Minteer?

A. Yes.

Q. Have you seen the figures in the Nativity scene?

A. Yes.

Q. Are those commercially reproduced, mass produced figures?

A. I believe they are.

Q. With respect to the utilities that are used in the area [160] of the grand staircase, the County does pay for those utilities, as far as you know; does it not?

A. I imagine. I think that there is nothing—in fact, I'm positive there's nothing additional put in place as a, in the way of spotlighting or selective lighting on that particular scene, where it would do that in the gallery.

Q. But there is lighting in that area; isn't there?

A. Whatever there is year round is there now.

Q. Indeed on, on Exhibit D, that is an illuminated electric light where the Nativity scene is; is that right?

A. Yes, um-hum.

Q. So to the extent that the Duquesne Light Company sends a bill for that, as you understand it, the County pays for that?

A. As far as I know.

Q. All right. Do you know of any sculpture that was placed on the staircase other than the Nativity scene?

A. The Director of the gallery forum explained to us when we spoke about this—

Q. No, no; do you?

A. Did I personally? Not in my time since March.

Q. You've been there since March?

A. Yes.

Q. And you've never seen one on the staircase; is that right?

A. No, not on the staircase.

[161] Q. Did the County pay for the poinsettias?

A. Yes.

Q. And the shrubs that are in that area?

A. The Christmas trees, yes, and the ribbons and the decorations.

Q. And did the County employees assist in putting those floral displays—

A. Yes.

Q. —around the Nativity scene?

A. Yes.

MS. LITMAN: No further questions.

MR. JANOCSKO: No redirect, Your Honor.

MR. SPECTER: No questions.

THE COURT: I guess you can step down.

THE WITNESS: Thank you.

MR. JANOCSKO: Your Honor, the County has no further witnesses.

THE COURT: All right. We'll mark the testimony closed for the County.

Do you have some testimony, Mr. Specter?

MR. SPECTER: Your Honor, the only evidence that I have, I find that I can put in by stipulation, which Your Honor should welcome at this stage of the proceeding.

There is a sign underneath the Christmas tree on the platform in front of the City-County Building. It was placed [162] there at the same time as the platform was placed there, and I have agreed with Mrs. Litman that I cannot state whether the same sign was there in the past. However, this particular sign, and the words which I am about to read are there now.

"Salute to liberty. During the holiday season the City of Pittsburgh salutes liberty. Let the festive lights remind us that we are the keeper of the flame of liberty and our legacy of freedom. Richard S. Caliguiri, Mayor." And then there are references to the Pittsburgh Department of Public Works, which placed the sign there.

MS. LITMAN: I'd just like to be sure that the record is clear, Your Honor, that Mr. Specter has said the sign was placed there at the same time as the tree, or the platform for the tree, and that that comes after the letter which was written to the Mayor by Ellen Doyle on behalf of the American Civil Liberties Union. Is that correct?

THE COURT: Can we get a stipulation on how big the tree is and how big the Menora is that usually goes up beside the tree?

MS. LITMAN: With respect to the tree, Your Honor, I just, I want to make it clear that the tree is not in issue in this case.

THE COURT: I understand that, but I'm trying to get some perspective on size of the two things.

I have photographs of the Nativity scene here. Can anybody [163] stipulate how big the tree and the Menora are?

MR. SPECTER: I personally don't know, Your Honor. I can put Mr. Fisher on.

Your Honor, we have a stipulation to this effect, that if Mr. Roy Fisher, Superintendent of building maintenance for the City of Pittsburgh, were called as a witness he would testify that the Menora is approximately eight-by-eighteen feet, the Christmas tree is approximately 45 feet high, and the platform is approximately 20 feet by 20 feet.

MS. LITMAN: That is the platform on which the Christmas tree sits.

MR. SPECTER: Right.

THE COURT: How tall is the tree; you say 45?

MR. SPECTER: About 45 feet.

THE COURT: And the platform is?

MR. SPECTER: 20-by-20.

THE COURT: I assume that the tree is on the platform?

MR. SPECTER: That's correct.

THE COURT: And the Menora sits on the platform?

MR. SPECTER: That's correct.

MS. LITMAN: No, Your Honor, the Menora is not on the platform.

MR. SPECTER: The Menora is not there at the moment.

THE COURT: I realize it's not there now, but it's proposed to be there, because it was there last year.

[164] MS. LITMAN: But, Your Honor, the Menora, just to clarify, doesn't sit on the platform. We just clarified that is the platform for the tree. And the Menora sits to the right of that.

MR. SPECTER: That's right.

THE COURT: To the right of the platform?

MS. LITMAN: Yes, Your Honor.

THE COURT: On the ground?

MS. LITMAN: On the steps, Your Honor, or the arches, I'm sorry, on the arches.

MR. FISHER: Your Honor, if one looks at the front of the City-County Building, there are three rounded arches. The tree sits in the middle arch with its platform. Between the middle arch and the one on the right is an upright column, and the Menora is placed on that column, to the right of the Christmas tree.

THE COURT: All right, Any other testimony?

MR. SPECTER: One moment, Your Honor, if I may. Your Honor, I also advise the Court that the sign, the wording on which I read into evidence a few minutes ago, is approximately 18 feet by 4 feet.

THE COURT: All right, Are you all through now?

MR. SPECTER: We are, Your Honor.

THE COURT: Close the record.

MS. LITMAN: Excuse me, excuse me, Your Honor, if I [165] may, I might have a very brief piece of rebuttal. If the Court prefers—may I just have a moment?

Your Honor, I do have a rebuttal witness in the courtroom. I have not interviewed that witness. I can just take a moment and call that person, or put her on first thing in the morning. Her testimony would be very brief.

THE COURT: Go ahead, interview your witness.

I say, interview your witness and we'll try to finish it up here.

MS. LITMAN: All right, I need to take a moment.

MR. McTIERNAN: Your Honor, we ask for an offer.

THE COURT: All right. Wait 'til the witness is sworn. Have you finished swearing the witness?

JAY FINKELSTEIN, LAW CLERK: Yes, I have, Judge.

THE COURT: All right. Take the stand.

You can ask for an offer now.

(Sidebar conference was held on the record:)

MS. LITMAN: This witness will testify that she is employed by the Antidefammation League in Pittsburgh; that last year she went over to the County Courthouse in order to check to see whether a particular display, a poster which she considered to be offensive was going to be put up, and indeed, saw the Nativity scene being erected by a number of people. She asked those people who they were. They told her they work for the County. She asked them if they put up the [166] Nativity scene in other years. They said they put it up every year. They further told her that they maintain the Nativity scene. And that will be the substance of her testimony, Your Honor.

MR. McTIERNAN: Two objections, Your Honor. Relevance, because it's last year—

THE COURT: Beg your pardon?

MR. McTIERNAN: Relevance, because it has nothing to do with this particular Nativity scene, and also hearsay, Your Honor.

MS. LITMAN: Your Honor, these people are, were clearly there. I think that these are admissions. They are within the Federal Rules.

MR. McTIERNAN: They have no authority to speak—

MS. LITMAN: And that what they were doing was part of their duties. And I think further, what happened last year is clearly relevant, both on substance, and also to impeach the testimony of Mr. Thomas, who gave testimony clearly to the contrary.

THE COURT: Well, the difficulty is that there's no showing that these people were authorized to make an admission, which would be an exception to the hearsay rule. Now, of course, the Director of the Public Relations Department said that Father Yurko put this up year after year, and didn't require any County help.

[167] MS. LITMAN: And he—

THE COURT: But the offer to have this witness say that she talked to people who were putting it up and they said they worked for the County doesn't supply the exception to the hearsay rule. The general exception is that if a person is in a supervisory capacity and authorized to speak for an entity, that the testimony will be received as an exception to the hearsay rule. But there's no showing here that they were in a supervisory capacity. So, I assume you're objecting.

MR. McTIERNAN: Yes, Your Honor.

THE COURT: I'll sustain the objection.

MS. LITMAN: Your Honor, with respect to the testimony—

MR. McTIERNAN: Your Honor, Mrs. Litman doesn't even know who these people are.

THE COURT: I've already sustained the objection, so I don't see any point in looking up the law. I may be wrong on the law, you see, frequently am, but we've already made the ruling.

MS. LITMAN: All right. Thank you, Your Honor.

(Sidebar conference was concluded.)

THE COURT: I guess the objection to your testimony has been sustained, so we won't hear from you.

MS. LITMAN: Your Honor, we have nothing further.

THE COURT: All right. Close the record.

Now, Mrs. Litman will have the burden, so I guess you [168] should argue first, yes. You want to make any arguments on the record?

MR. SPECTER: Your Honor, I assume we'll have the opportunity to rebut Ms. Litman's?

THE COURT: Yes, you'll have an opportunity to rebut.

All right, Ms. Litman, they have deferred to you.

MS. LITMAN: Mr. Pushinsky is going to argue the law of the case, Your Honor.

THE COURT: All right. Your problem, as I see it, is to establish the difference between this and Lynch vs. Donnelly, which is the last word I see written by the Supreme Court on the general subject. That was the City of Pawtucket, Rhode Island case.

Could we agree to ten minutes per side? I have no objection, but my help has been here all day. Would that be sufficient?

* * * *

[3]
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THE COURT: We're ready to begin.

MR. SAUL: Your Honor, for the record, perhaps I could make my appearance. My name is Charles H. Saul, counsel for Chabad. And before I start, I would like to thank Your Honor for giving us the opportunity to intervene and introduce the limited evidence we will attempt to adduce today.

Your Honor, intervenor at this point calls Bob Gerardy.

BOB GERARDY, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SAUL:

Q. Could you state you name and address for the record, please.

A. Bob Gerardy, 943 Mellon Street, Pittsburgh.

Q. Mr. Gerardy, where are you employed?

A. With the City of Pittsburgh.

Q. And for how long have you been employed there, approximately?

A. Six years.

Q. And what's you job there?

A. I'm a photograph, dark room technician.

Q. Okay. Now directing your attention to December 22nd of 1986, do you recall taking a photograph or photographs—

A. Yes.

[3]

Q. — on that date?

A. They were photographs in front of the City-County Building.

Q. Okay. I show you what has been marked as Intervenor Exhibit Number 1. Could you identify that for us, please.

A. That is in front of the City-County Building, taken in December.

Q. Okay. And did you take that photograph?

A. Yes, I did.

Q. And does that fairly and accurately depict what you saw on that particular date?

A. Yes, it is.

Q. And I show you what's been marked as Intervenor Exhibit Number 2. Could you identify that, please.

A. It's the sign beneath the tree in front of the City-County Building.

Q. Okay. And does that fairly and accurately depict what you observed on that date?

A. Yes, it does.

MR. SAUL: Your Honor at this time I would move for the introduction of the Intervenor Exhibits 1 and 2.

THE COURT: All right. They will be received.

MS. LITMAN: Your Honor, if the Court please, I have an objection that I would like to pose to the Court.

THE COURT: All right.

[5]

MRS. LITMAN: I think it necessary that Your Honor see the photographs in order that my objection may be evaluated.

With respect to Intervenor Exhibit 1, Your Honor, and similarly with respect to Intervenor Exhibit 2, I would like to point out that the Christmas tree in front of the City-County Building is not an issue in this suit. No objection has been made in this suit to the structure of the Christmas tree, so that we would not object to a cropping of the photograph to show the menorah. We do object to its position with the Christmas tree.

And particularly with respect to Intervenor Exhibit 2, which is a blow up of the sign that pertains to the Christmas tree which pre-existed the menorah, which is a new sign this year which has nothing to do with the menorah as such, so that we think it irrelevant and we think it prejudicial to have it in this case.

Therefore, the objection is as to Intervenor Number 1 only to that part of it which shows the Christmas tree and the sign beneath it. And with Intervenor Number 2, it's objected to because it isn't relevant at all to what is in issue in this suit.

THE COURT: All right. Your objection may appear of record. Anyone else wants to make any comment: objection?

MR. SPECTOR: No objection.

MR. SAUL: If I may respond very briefly. It's our [6] position, it's here, this is the scene, this is the overall display that the City presented, and it's obviously, the whole display is obviously relevant. It all appears as one. We've already had some preliminary oral testimony as to the entire scene, which I believe Mr. Winicoff attempted to describe, but I believe a picture is worth a thousand words, and that such more clearly shows us a picture of the scene, and the Court and the reviewing bodies can review the entire thing rather than cropping.

THE COURT: All right. I've received the exhibits. The objection will be duly noted.

MS. LITMAN: Your Honor, we would like to ask that with respect to the Court's role as a finder of fact, that it be made clear either now or at such time as Your Honor does find the facts, that the sign with respect to the Christmas tree be limited to the Christmas tree, since it appears clearly on the photograph to have no relation to the menorah.

THE COURT: All right.

MR. SAUL: I have no further questions.

THE COURT: Any cross?

MR. SPECTER: None, Your Honor.

MR. JANOCSKO: None from the County, Your Honor.

MS. LITMAN: Yes, Your Honor, I have some cross examination.

CROSS EXAMINAION

[6]
BY MS. LITMAN:

MS. LITMAN: Do you know that exhibits, what exhibit number we are up to; do you have the number?

JAY FINKELSTEIN: No, we don't.

MRS. LITMAN: I think this one is 14.

Q. Mr. Gerardy, I show you a newspaper clipping bearing the sign on the top, the Pittsburgh Press, dated Monday, December 22nd, and depicting a scene which is titled in the picture "Festival of Lights", marked here as Exhibit 14, and ask you to look at that photograph, sir, and tell me whether you agree that on December 22nd that photograph accurately represents the menorah as it existed on that day?

A. The location of the menorah is correct.

Q. With respect to the persons in the picture identified there as City employees who are erecting the menorah, did its erection take place on that day; do you know?

A. I have no idea. I went and took the photograph on the 22nd.

Q. And at whose direction did you take the photograph on the 22nd.

A. By the City Solicitor, Mr. Specter.

Q. And did he direct you to do it at some time before that date? I mean how did you know to go on the 22nd?

A. No. I received a call on the 22nd and he asked me to get up there around noontime.

[8]

Q. And so by noontime was it already erected?

A. It was completed.

Q. Except for the two gentlemen on the ladders who are shown in that photograph, with respect to all the other placement on the photograph, does that comport with the way the menorah looked and where it was on the City-County Building when you saw it?

A. As far as the location of it, that is correct. The only difference between this and my photograph is I included the whole scene.

Q. Right. And did you include the whole scene, including the Christmas tree, because Mr. Specter directed you to do that?

A. No. I was instructed to take a photograph of the front of the City-County building, including the menorah, so I tried to include as much as I could.

Q. Now was it at someone's direction that the blow up of the sign underneath the Christmas tree was made?

A. I went in and took a closeup photo. That is actually a separate photo of the scene.

Q. Did Mr. Specter direct you to do that?

A. He wanted some closeup shots of the scene so you could read it. He was concerned maybe the wording of the scene couldn't be seen far away.

Q. So he directed you to take the closup?

A. Um hum.

[9]

Q. Now, with respect to Plaintiff's Exhibit 14, do you see where in the scene the boom is shown, and it says, "boom height, 11 feet 6 inches"?

A. Um hum.

Q. Does that, or does anything about your recollection help you to describe just how high the menorah was as you saw it?

A. I couldn't go by the relationship of the boom. The only thing I could go by would be the height of the tree. I would say it's half the height of the archway in the City-County Building.

Q. Okay.

A. That boom may be deceiving.

Q. Okay. Were there any other photographs that you took?

A. No. They were all the same composition.

Q. Okay.

MS. LITMAN: Your Honor, we offer into evidence Exhibit 14.

MR. SAUL: Objection, Your Honor. The picture has not been authenticated, and the Exhibit includes some descriptions here which the witness hasn't even testified to.

THE COURT: Oh, I think we'll receive it also.

MS. LITMAN: Thank you, Your Honor.

THE COURT: Objection will be overruled and we'll make it a part of the record.

MRS. LITMAN: I have no further questions, Your [10] Honor.

MR. SAUL: No further questions.

THE COURT: You better label this.

I guess you can step down.

MR. SAUL: Your Honor, Intervenor calls Ray Fisher.

RAYMOND D. FISCHER, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SAUL:

Q. Would you state your name and address for the record please.

A. Raymond D. Fischer, 1301 Dickens Street.

Q. Mr. Fischer, who are you employed by?

A. City of Pittsburgh.

Q. And what is your position with the City of Pittsburgh?

A. I'm Superintendent of Building Maintenance.

Q. And about how long have you held that position?

A. Approximately eight years.

Q. Briefly what's your job there, your job duties?

A. I maintain 200 City buildings, 34 swimming pools and two skating rinks with approximately 70 employees.

Q. Are you familiar with the City's display on the City-County building that was erected in 1986?

A. Very much so.

Q. Okay. And do you have any knowledge as to when the [11] Christmas tree and when the scene and platform and menorah were erected?

A. Erected the platform on the 13th of November.

Q. Okay. Now that's, showing you Exhibit, Intervenor Exhibit Number 1, what are you referring to as the platform?

A. The platform would be the, which the sign is posted to on the front which the tree is erected on.

Q. Okay. And what went up next?

A. What we do then is we paint the platform and then the tree is erected.

Q. Okay. Do you recall offhand what the date was the tree was erected?

MS. LITMAN: If the Court please, this is objected to on the grounds of relevancy. The platform for the Christmas tree, the Christmas tree itself, the sign under the Christmas tree are not at issue in this suit and we have not brought in any evidence to object to them and I object that this is not relevant.

THE COURT: Oh, I think we'll let him state briefly when he erected the whole thing.

If you can, just tell us when you erected the tree and the sign and the menorah and everything there.

A. Okay. The platform went up on the 13th of November, 1986, the tree on the 17th, and the menorah was erected on the 22nd.

Q. Okay. And?

[12] MS. LITMAN: The 22nd of?

A. Of December. I'm sorry, December.

Q. And, I'm sorry, the sign, then, was put up when?

A. The sign would have been put up—and I don't have the exact date. The way it works here, after the tree is up and decorated and everything, and then the sign is just attached to the front, the apron.

Q. And the sign then went up approximately how many days or so after the Christmas tree?

A. A few days.

Q. A few days, okay. And you mentioned that the menorah was not put up until December 22nd. Do you have any reason, do you know why it was not put up until December 22nd?

A. Yes. There was controversy and I was ordered to not put the menorah up at this time.

Q. Okay. And normally what would be the sequence of events; absent some of the legal controversy, what would be the sequence of events of how the display would be put up?

A. When we—I had the lifter up there to put the tree, tree up, I would have also put up the menorah.

Q. Is this the procedure that's been used in past years, to your knowledge?

A. Yes sir.

Q. And what's the proximate length of time to put up the menorah?

[13] A. A hour.

Q. Okay.

Q. Showing you then, again, Intervenor Exhibit Number 1, does that fairly and accurately depict the scene there at the City-County steps from December 22, 1986 until the display was taken down?

A. Yes, sir.

Q. And do you recall when the display was taken down?

A. It was right around mid-January.

Q. Of 1987?

A. 1987.

Q. Was everything taken down at the same time?

A. Yes, sir.

Q. And once the sign was put up shortly after the Christmas tree, does that, with the exception of the Hanukkah menorah, accurately depict what was on the City-County steps between the time the sign was put up and the time the menorah was put up?

A. Yes, it does.

MR. SAUL: I have no further questions, Your Honor.

MR. SPECTER: No questions.

MR. JANOCSKO: No questions.

CROSS EXAMINATION

BY MS. LITMAN:

Q. Mr. Fischer, isn't it a fact that the Hanukkah menorah is put up at a time to comport with the Hanukkah season?

[14] A. Yes.

Q. Now, indeed, the Hanukkah menorah has been put up in previous years; isn't that correct?

A. That's correct.

Q. Now, you've been the Superintendent of Building Maintenance for eight years; that's correct, isn't it?

A. Yes, ma'am.

Q. So that it's during your position as the Superintendent of Building Maintenance that the custom came about of putting up a Hanukkah menorah; isn't that right?

A. Well, it was, I think that it's been much more that they have been putting up the menorah. I'm not sure. I think the past superintendent before me was doing the same thing.

Q. Isn't it a fact that the erection of the Hanukkah menorah at the City-County building came about in approximately 1979 or '80?

A. To be very honest, I'm not sure. I couldn't tie that down. I'm just not sure.

Q. Now, with respect to the timing this year of the Hanukkah menorah and your testimony that it wasn't put up at the same time as the Christmas tree because of the controversy pending in this lawsuit, isn't it a fact that this lawsuit wasn't even filed until December 10th, almost three weeks after the erection of the Christmas tree?

A. That's very possible.

[15] Q. Let me show you a photostatic copy of the summons which marked the filing of the suit and show you that date. And what does it read?

A. 12/10/86.

Q. And 12/10/86 is about three weeks after the Christmas tree itself was erected; isn't that right?

A. Yes.

Q. You're nodding?

A. Yes. I'm sorry.

Q. And it's after the platform was erected; isn't that right?

A. Yes.

Q. And it is some approximately 20 days after the sign was erected; isn't that right?

A. Yes.

Q. Now, you recall, do you not, that in previous years, including 1985, a sign was put up under the Hanukkah menorah as well; isn't that correct?

A. I do not recall a sign being put up.

Q. Let's see if we can help refresh your recollection.

Q. I put before you a book entitled, "Let There be Light", subtitled, "30 Days in the Lives of the Chabad-Lubavitch Lamplighters", and direct your attention to that page noted as Pennsylvania, and the photographs on that page, including one on the lower right-hand side, and ask you whether, indeed, you [16] recognize that photograph as a scene showing the Hanukkah menorah in front of the City-County Building?

A. I would say, yes, that is the scene on the City-County Building.

Q. All right. Well, first—yes, it is the menorah at the City-County building.

A. Yes.

Q. And if the photograph has been identified both by the book and will be identified by other witnesses as one which was taken in 1985, would you agree that that's the way the menorah looked with the sign in 1985?

A. I don't really recall the sign.

Q. Do you see the sign well enough to agree that it reads at least at the top, Happy Hanukkah?

A. Um hum.

Q. You see that?

A. Yes.

Q. Does that refresh your recollection that there has been such a sign at the City-County Building?

A. I really can not recall the sign.

Q. You just don't remember at all?

A. I just don't remember, right.

Q. It is a fact, is it not, that the City employees erected the menorah, that is correct, isn't it?

A. Yes, that's correct.

[17]

Q. And it is correct, is it not, that City employees took down the menorah; isn't that so?

A. That's also correct.

Q. And it is a fact, is it not, that the City stores the menorah; isn't that correct?

A. That's correct.

MS. LITMAN: No further questions.

MR. SAUL: No questions, Your Honor.

THE COURT: I guess they are through with you. You can step down.

MR. SAUL: At this time, Your Honor, Intervenor calls Rabbi Yisroel Rosenfeld.

RABBI YISROEL ROSENFELD, having first duly affirmed, testified as follows:

DIRECT EXAMINATION

BY MR. SAUL:

Q. Could you please state your name and address for the record.

A. Yisroel—Y-i-s-r-o-e-l—Rosenfeld—R-o-s-e-n-f-e-l-d—2214 Shady Avenue, Pittsburgh.

Q. Rabbi Rosenfeld—first of all, are you a Rabbi?

A. Yes.

Q. And could you give us a brief description of your background, educational background?

MS. LITMAN: Excuse me for interrupting, Rabbi, but I [18] wasn't sure what the question was. Are you a—R-a-b-b-i?

MR. SAUL: Yes.

MS. LITMAN: Sorry.

Q. Could you give us a brief description of your background leading up to your ordination as a Rabbi?

A. My background began with my home, the practices in my home, leading into a day school education starting with preschool, going through high school, going on to rabbinical college for the ordination, for the specific ordination that I did receive, then leading into internship, basically being, following, watching, observing other rabbis.

Q. And how long of a intership was this?

A. Several years.

Q. And what's the significance of the internship?

A. Most importantly the significance of that is just learning the laws isn't sufficient to be able to present a Lubavitch viewpoint, a viewpoint of the law. One needs to know how to take what you see and how to read that, how to apply it to what needs to be done. The way to do that is by serving an internship with other rabbis that have had all the experience in that, observing them and watching them, learning from them.

Q. And what, you mention your family background. Could you be a little more specific with your respect to your family background and your education?

A. Talking about my family background. My grandfather was, [19] came from the old country about 65 years ago, was one of the first, held one of the first pulpits in a congregation in the Borobeck section of New York.

Q. Was he a Rabbi then?

A. He was a Rabbi.

Q. And your father?

A. He came from the old country as a Rabbi and then came to the States being a pulpit Rabbi, and a leading pulpit Rabbi. That's one of the Rabbis I had intership with, because we lived with him as well. My father is a pulpit Rabbi now.

Q. I see.

A. And has been so for many years.

Q. And briefly, you mention day school. Could you—what's a day school?

A. Basically a day school is one that conveys to the Jewish child an education in Jewish subjects as well as secular subjects, to enable the child then to go into the

world familiar with what his Jewish identity is all about, what Jewish rules and regulations are all about, and it is the kind of education that will give the child an education beginning with perhaps 8:00 o'clock in the morning until about 4:00 or 5:00 o'clock in the afternoon every day, for many many years.

Q. And your day school education began when?

A. When I was about eight years old. Takes us back about 27 years ago.

[20]

Q. And that continued through high school?

A. Continued through high school and then on to rabbinical college.

Q. And the ordination that you received, is there any other higher ordination than the one you received?

A. No, there isn't.

Q. And what is your current position?

A. Currently I serve as principal of Yeshiva Achei T'mimim; happens to be Pittsburgh Pioneer Day School. It's a day school that's been here in Pittsburgh for over 40 years. I now serve as principal of that day school.

Q. All right. And are you a teacher there as well?

A. Yes.

Q. Could you tell us what a responsum is?

A. A responsum is a—is a letter put together on rules pertaining to Jewish law.

Q. And have you authored any responsum?

A. Yes.

Q. Could you describe?

A. With different questions that have come up over the years that have been presented to me and I've been asked to author a responsum on that, I did the research on it and authored the responsum on that. Many of them have been printed.

Q. Okay. By the way, what do you teach at your school?

A. Jewish law.

[21]

Q. And you serve as a rabbinic legal consultant within the Jewish community in Pittsburgh?

A. A rabbinic consultant. I'm not sure what you mean by legal consultant. A consultant for Torah law, for Jewish law.

Q. Now, could you tell us, we're here, we've had the name Chabad mentioned. What is Chabad?

A. Chabad and Lubavitch, for that matter, the name is used either Chabad or Lubavitch is part of the Jewish community that looks generally, Jews have in the past looked to leaders for advice, for guidance. Chabad is a group that looks to the Lubavitch Rebbe Schneerson.

Q. Rebbe, we would spell how?

A. R-e-b-b-e.

Q. Okay.

A. Looks to him for guidance and it's part of an international movement that has been estimated to have over 100,000 followers internationally.

Q. Okay. And is that part of what some people would call the reformed, convervative or orthodox branch of Judaism?

A. It would be part of the orthodox.

Q. And the orthodox, is that the more traditional or less traditional part within Judaism?

A. More traditional, although, may I note that Chabad Lubavitch doesn't really look at the labels of Judaism as saying orthodox, conservative, reformed. A Jew is a Jew.

[22]

Q. Okay.

Q. Rabbi Rosenfeld, is the menorah a purely religious symbol?

A. No.

Q. What symbolic significance in general does the menorah have?

A. It carries many messages with it. It carries a message, an historical message, cultural message, a message of ethnic pride; a universal message.

Q. Okay. Let's go first to the historical message. What historically does the Hanukkah menorah connote?

A. It tells us what took place when the Jews were challenged by the Syrians, the Greeks, and it was the few in the hand of the many, and they were able to overcome that.

Q. Okay. And "they" talking about the historical events?

A. Historical events, that is correct.

Q. You mentioned cultural significance. What did you mean by the cultural message?

A. The Jews as the Jewish People, rather than the Jewish religion.

Q. I see. You also mentioned universal messages. What symbolic universal messages does did menorah have?

A. Amongst the messages, that a little bit of light dispels a lot of darkness, a message of freedom of minorities to allow them to practice whatever it is that they may want to.

[22]

Q. Okay. And what about political significance or messages?

A. The fact that the Jewish people at that particular time were able to overcome their oppressors in a political sense and allowed to establish what they wanted as their particular governing set up.

Q. Let's go to the religious message. First of all, are you familiar with the laws and the procedures regarding the lighting of Hanukkah menorahs?

A. Yes.

Q. And what's your background, or how is it that you're familiar with those procedures?

A. My education, be it Talmud, Code of Jewish Law. And intership again.

Q. And as far as place with respect to the menorah, and the lighting of the menorah, where do these laws and procedures apply to?

A. Looking into the sources of where, pertaining to the lighting of the menorah in the original sources, the place that the menorah is stated it needs to be lit is in the home, and in the home it is at the door post.

Q. Okay. And is it a religious obligation, or what's referred to as a mitzvah, to light a Hanukkah menorah in the home?

A. Yes, it is.

Q. Is it a religious obligation or mitzvah to light a menorah [24] in a public place?

A. No, it isn't.

Q. Is it considered in any way sinful or improper or a ritual omission to fail to light a Hanukkah menorah in a public forum?

MS. LITMAN: That's objected to, Your Honor, as irrelevant. The case has, does not depend, nor is the law in any way dependent upon what is sinful or what is an omission for Jews. Lemon teaches us, and Lynch versus Donnelly affirms, that these are not the tests.

The test, as the Court knows, is the govenment's position in advancing. If something has the effect of advancing or endorsing religion so that the particular practices or beliefs of some segment, or what is a religious obligation of a specific Jew or a particular sect of Jews, is not relevant in this case.

THE COURT: Oh, I think we'll let him talk. I think all he said was that it's not obligatory to light a menorah in a public place. We'll let that remain of record.

Go ahead.

Q. Okay. Is it, would it be any type of a ritual omission to fail to light a Hanukkah menorah in a public forum?

A. No.

Q. So, in summary, then, where do the Jewish laws apply to with respect to the lighting of the Hanukkah menorah?

[25]

A. In the home.

Q. Are you familiar with Hanukkah lightings sometimes in synagogues?

A. Yes.

Q. Okay. Is it a—is that done uniformly within Jewish synagogues; do all Jewish synagogues do that?

A. I wouldn't say all.

Q. Okay. Is it—is it a religious obligation to light a menorah in the synagogue?

A. No, it isn't.

Q. And if one would light a Hanukkah menorah in either a synagogue or outside in a public forum, would one still have to light a Hanukkah menorah in the home?

A. Yes.

Q. To fulfill the ritual?

A. Yes.

Q. More specifically then, is the lighting of a menorah in a public forum, such as the steps of the City-County Building, a religious obligation?

A. No.

Q. And is that lighting a ritual act?

A. No.

Q. In terms of Judasim, what would be, what would be examples of—what is considered, I should say, a religious act?

A. There are many of them. Examples of some of them would be [26] lighting a menorah in one's home, eating whole meat kosher, many more.

Q. Okay. And are those in some way related to what we've been calling a mitzvah?

A. Yes.

MS. LITMAN: Excuse me, could the reporter please read back the Rabbi's previous answer?

(Witness' answer read back by official reporter.)

Q. So then, what, then, in terms of Judasim—

A. Can I—

Q. You want to explain something?

A. Yes. I think for a better example, rather than using the example of a mitzvah of eating only kosher, one does not have to eat something that—put it this way, it isn't an obligation for somebody to eat the kosher thing. If somebody doesn't eat kosher that's an omission of something of the Jewish religion, but for purposes of an example of a religious ritual, if we use something that, such as a Massusad on the door post of a home.

Q. Okay. Now, then, in Judasim, what is considered a religious, a religious act or ritual act?

MS. LITMAN: Your Honor, if I may, rather than interrupt, I would like a continuing objection to those questions which are posed, for what is considered for any individual a religious act or obligation isn't, that isn't the [27] test. I understand Your Honor has ruled.

THE COURT: I think now we're getting into unnecessary matters. You see, as I understand the thrust of his testimony, and to some extent it's repetitious because the

Rabbi that testified at the hearing back in December I think said that the lighting of the menorah was not necessarily a religious act, would depend upon the circumstances. This man's testimony is the same.

He says, as I understand him, that it's not a obligation in the religious sense to light a menorah in a public place. Therefore, you're laying the ground work for an argument that this display of the menorah on the steps of the City-County Building was not necessarily a religious display, therefore, did not necessarily have any religious significance. And I think that's what you're getting to. But it's not necessary for him to relate everything that one might do that did have religious significance, because we could perhaps listen to a whole long list of things that did have religious significance.

MR. SAUL: Okay.

THE COURT: So I don't think you need to go into that.

MR. SAUL: Okay. Thank you.

Q. Is the candelabra, the menorah itself, what is of religious significance, or is it the lighting of the candles, [28]
or both or what; what is the religious—where does the religious significance lie?

A. The lighting of the candles in one's home.

Q. What, then, is the primary significance of a Hanukkah menorah in a public forum?

MS. LITMAN: Excuse me, Your Honor, there is no public forum at issue here. We're talking about the City-County Building. There is—excuse me.

MR. SAUL: I'll withdraw the question.

MS. LITMAN: To the extent that counsel has referred to it as a public forum, we want to interpose the objection, because clearly it is not, no evidence has been laid for that. And I think there is no basis on which to even refer to the City-County Building as a public forum. It's not Lafayette Park, which is across from the—

THE COURT: I don't know whether it's the right description or not, but historically I suppose the City-County Building one called a forum. I seem to recall that the Romans considered the vast plaza in front of their buildings as a forum. And I suppose some people would say a forum must contain humans who discuss things. Other people would say a forum is simply a big plaza in front of a public building. What difference does it make what we call it. It's the steps of the City-County Building.

MS. LITMAN: And I have no objection to the latter.

[29]

My objection—and, of course, the manner in which Your Honor describes it would not be objectionable. The use of the word "public forum", or the words "public forum", to the extent they are meant to imply what the Courts and Federal Courts have indicated are public forum, are a public forum is a very different thing from what Your Honor has described, and in those they have legal signficance as to what must be done there to make it be a public forum, as to what the City would have to permit, whether it wanted to or not, in order to have it be a public forum. And as I understand the testimony in this case the Chabad was given permission by the City. There are none of the elements that would comport with the Court's decisions as to what are public forums. That's why this, the City-County Building, for example, would be totally different from a public park, and if Your Honor—

THE COURT: Oh, I don't think we need argue about definitions here. Let's just let the record show what the pictures, what the photographs show. It's the steps of the City-County Building.

MS. LITMAN: I have no objection to using the term, City-County Building steps.

THE COURT: It's public property. I don't know that it makes any difference what you call it.

MR. SPECTER: Your Honor may I just add, with all due respect, I must join in the objection, even though it appears [30] to me the question has been withdrawn, because we do suggest that the term "public forum" is a term of art in the law and has been so defined by the Supreme Court in many cases. And therefore, I would join in the objection of Mrs. Litman.

MR. SAUL: Your Honor—

THE COURT: I still don't understand the objection has very much significance. You just object to the attorney here calling this a public forum because you say a public forum has a definition. So, we'll assume that the attorney doing the questioning or the witness answering the questions cannot establish what a public forum is. So it doesn't matter what they call it, your point is it has a definition. So I think we're wasting time.

Go ahead with your next question.

MR. SAUL: Yes.

Q. What—

MR. SAUL: I'll rephrase my question, Your Honor. And we'll argue this in briefs, I guess.

Q. What, then, is the significance of the menorah in a public place such as the City-County Building?

A. The significance would be to reach out to as many people as possible to who otherwise the message will not get across to as far as ethnic pride, just as would the St. Patrick's Day parade be a message of ethnic pride for somebody to identify themselves with, as well as relaying all the messages that the [31] menorah carries as mentioned before.

Q. Okay. Is the menorah itself an inherently religious object?

A. No.

Q. And on what do you base your answer?

A. Inherently religious object has specific acts as to the way one needs to deal with the sanctity, such as books of Torah, or as specifics, the way one can or cannot discard of it, or in what manner or what fashion. The menorah doesn't have any of those rules. There's no sanctity in time to the menorah itself.

Q. And examples of objects within Judaism that would have this inherent religious significance would be the one that you mentioned, the torah and so forth?

A. That's right.

Q. What happens, for instance, if a Torah should drop to the ground?

A. One needs to fast, because of the sanctity of it.

Q. And are there—

A. Again, also, if the Torah can no longer be used it needs to be buried in a special manner.

Q. What about a menorah?

A. There aren't any rules relating as to what needs to be done to the menorah after its use. One may do with it what one pleases.

[32]

Q. And what can menorahs be made of?

A. Just about anything.

Q. Could you give us examples of menorahs that you've seen made out of different materials?

A. Made out of bottle caps, pieces of tin—

Q. And?

A. Cups.

Q. And can one just discard it when one's through with it?

A. Yes.

Q. And does one, is that violating any ritual, or mitzvah, or tenents of Judasim by doing so?

A. No.

Q. Just for visualization purposes, I show you what's been marked as Intervenor's Exhibit Number 3. Could you identify this?

A. Yes.

Q. What is this?

A. A menorah.

Q. It's an acceptable menorah?

A. Yes.

Q. And if I dropped it to the ground, any problem with that from a religious standpoint?

A. No.

MR. SAUL: Your Honor, I'd move for the introduction of Intervenor Exhibit 3.

[33]

MS. LITMAN: Objection as to relevance, Your Honor. It's not the menorah in issue. I'm sure there are many kinds of menorahs.

THE COURT: Well, I have no reason to sustain any objection to it except that seems to me it's kind of impractical for the clerk to deal with, and we have pictures, photographs of the real menorah in this case. And I think we can describe what this one is for the record. It is a small piece of metal. It's about six inches long and two and a half inches wide and it has receptacles for candles and small wire legs on it. And therefore, it's admissible to show what a menorah looks like, but it's excluded only because it's difficult to handle.

MR. SAUL: I'll withdraw it.

THE COURT: And I believe almost anybody, in any event, has seen many menorahs. They are commonly displayed during the holiday season. I think I can take judicial notice of the fact that I've seen them in many places. So, we don't need to add it to the record.

MR. SAUL: Thank you.

Q. Have you observed menorahs and candelabras of this nature being used at other times of the year besides Hanukkah?

A. Yes.

Q. And what have you observed it being used as other than on Hanukkah?

[34]

A. Be it political symbols, such as the one, the symbol of the State of Israel, or as symbols of art, or whatever one would like it to be used as. It's up to the individual.

Q. Would it be improper to use it as a candelabra at other times of the year.

A. No.

Q. Have you observed it used as such at other times of the year?

A. Definitely.

Q. And is it any kind of a religious act at that time?

A. No, just a common candelabra lighting of the room.

As a matter of fact, in my own home we use what we use as a Hanukkah menorah for purposes of putting in candles to brighten up a room for occasions.

Q. Now, is a menorah a symbol of the Jewish religion?

A. No.

Q. And could you explain.

A. When used on Hanukkah in the home it is definitely symbolizing a religious ritual, religious act that one is obligated to do; whereas, at other times the menorah can symbolize anything that one wants it to symbolize.

Q. Does the menorah placed in the home, and lit in the home and so forth remind one of a miracle that, a miracle from God?

A. Yes.

Q. Does that make the menorah into a religious object?

[35]

A. No.

Q. Could you give me examples of other objects which may remind one of a miracle or one, reminds one of God but which would not be considered a religious object?

A. Pertaining to Hanukkah itself you can find several examples, such as if there's a commonly used dradel, which is a little something that spins that has some Hebrew letters on it that says "nes godol shaya" It's n-e-s——g-o-d-o-l——shaya—s-h-a-ya—I may be misspelling it. It's approximately—shom—s-h-o-m—relating to the miracle that occurred on Hanukkah. Nevertheless, it has no sanctity this time to it. It's a toy that's used for children to play with; it's a game that's used, that's played. The game is basically played by putting coins into a pot and if it lands on a gimel, the one that has their hand on the gimel wins the whole pot of coins there and so on. The shom make him put in another coin. Basically it's only, it's a toy, yet it reminds one of the miracle that occurs. Similarly so, when—

Q. Before you go on, I'm not sure if you mentioned the —let me first identify Intervenor Exhibit Number 4.

Q. Would you identify what Intervenor Exhibit Number 4 is?

A. A dradel.

Q. And the letters that are on there are, those are Hebrew letters?

A. That's correct.

[36]

Q. And what do they signify again?

A. A miracle happened, occurred.

Q. And there's a, one letter that's looks like a backward "C" on it?

A. Um hum. That is a nain.

Q. And the nain stands for; and nain means?

A. A miracle.

MR. SAUL: Your Honor, I move for introduction of Intervenor Exhibit 4.

MS. LITMAN: Your Honor—

THE COURT: I assume no objection.

MS. LITMAN: I don't know how it's relevant.

THE COURT: We'll receive it. I take it it's groundwork for an argument that the menorah in a public place has no more significance that a dradel.

MR. SAUL: Or just because it may remind one of a miracle does not make that, in and of itself doesn't make the menorah a religious object.

THE COURT: All right.

MR. SAUL: Okay.

Q. You mentioned there were some other Hanukkah symbols?

A. Another symbol, it's customary also to eat lotkas on Hanukkah.

Q. Lotkas?

A. L-o-t-k-a-s.

[37]

Q. And lotkas are?

A. Potato pancakes.

Q. And why is that customary on Hanukkah?

A. Which are fried in a lot of oil. The custom of it is, because to remind us of the miracle that occurred with the oil with the lighting of the menorah. Again, that in itself is not a religious object, it isn't a religious symbol, yet it reminds us of the miracle.

Q. Okay. Just a few last things.

MS. LITMAN: Your Honor, I would like the Court to know I was not going to object to the introduction of a potato lotka.

THE COURT: All right.

Q. Now, are you familiar with menorahs being lit around Hanukkah time outside other than at the City-County Building?

A. Yes.

Q. Approximately how many have there been in the past few years that you're aware of?

A. In this particular City?

Q. Just in this particular City.

A. I would say somewhere between five and ten.

Q. Okay. And yet you've also asked and been granted permission to display one at the City-County Building. Why is it that those others out in public don't suffice?

MS. LITMAN: That's a leading question, Your Honor. [38] The witness has not said they don't suffice. That's counsel's testimony.

THE COURT: I think that's right. He hasn't said yet that the five or ten aren't sufficient.

MR. SAUL: I'll—

THE COURT: I don't know that anybody knows how many are sufficient, or whether it has any significance, or whether it makes any difference.

Go ahead. Ask him why they like to have it at the City-County Building if you want to.

MR. SAUL: Okay.

Q. Could you?

A. Okay. As mentioned before, we wants the message to come across to as many people as possible, and generally when one wants to bring a message across, the place that it's brought to historically has always been the City-County Building.

Just a couple of weeks ago, must have been about a month ago or so, there was a demonstration for Soviet Jewry. Where was it brought to, the City-County Building.

Q. Okay.

A. Because that's a place where people see it, more people see it, and it's important to bring it there, to carry the message.

Q. Do you know, by the way, who sponsored that demonstration on behalf of Soviet Jewry at the City-County Building?

[39]

A. I believe it was the B'Nai B'Rith.

Q. And that's the B'Nai B'Rith as in Anti-Defamation League of B'Nai B'Rith?

A. That's correct. And many other organizations joined in.

Q. You mentioned the, one of the messages of the Hanukkah menorah being that of religious liberty. Is that solely religious liberty for Jews?

A. Most definitely not. Perhaps that would be the antecedent of that. It points out religious liberty for anyone, for any, specifically any minority to act as they feel appropriate as a minority.

Q. Would that also be for people who do not want to be part of a religion?

A. Yes. It's the message basically of freedom of one's consciousness.

Q. In any way by placing or asking the City to place the menorah on the City steps, are you in any way attempting to establish Judaism as some kind of a national religion?

A. Most definitely not.

Q. And in any way by the displays of the menorahs are you attempting to have people convert to Judaism?

A. Definitely not. As a matter of fact, Jews have always stayed away from looking for converts. We don't look for converts.

Q. And to the extent that we have mentioned God here and [40] whatever religious message there maybe at certain times and certain places, in Judaism is it considered to be just a Jewish God or what?

A. No. It's a God for the entire universe.

Q. The messages that you have described for the Hanukkah menorah and it's significance and the significance of the holiday and so forth, are those, to your knowledge, solely the views of Chabad?

A. No.

Q. What are they the views of?

A. Of Jewish law, Halahau.

Q. And have you, have you had such messages being displayed by reform and conservative branches, or people within the, rabbis within the branches of Judaism?

A. Yes, I've seen them.

Q. Just finally, and for purposes of clarification, Mrs. Litman asked a witness about a sign that was displayed in that book, "Let There be Light". Are you familiar with that sign?

A. Yes.

Q. Okay. Could you describe the circumstances behind the placement of that sign and—

A. That sign happened to be placed there by an individual on his own, and was there for perhaps a half hour or so for him to take a specific picture he wanted. After that it was no longer there. I don't believe it was there at all throughout [41] any other time than for those few minutes that that particular person wanted those pictures.

Q. Okay. And was that, did the City display that sign?

A. No.

Q. Okay. And was Chabad itself responsible for that sign being placed there?

A. No.

MR. SAUL: I have no further questions, Your Honor.

MR. SPECTER: No questions.

JANOCSKO: No questions.

MS. LITMAN: May I just have a moment, Your Honor?

CROSS EXAMINATION

BY MS. LITMAN:

Q. Rabbi Rosenfeld, is it appropriate to refer to you as a Lubavitch Rebbe?

A. Yes.

Q. And I think you've already explained that Chabad, which is the intervenor in here in this suit, and Lubavitch are the same thing?

A. That's correct.

Q. You do agree, Rabbi, do you not, that in Pittsburgh there are approximately 45,000 Jews?

A. Approximately.

Q. And of those, some follow the orthodox tradition; is that correct?

[42]

A. Correct.

Q. Many follow the reformed tradition; is that correct?

A. Correct.

Q. Many follow the conservative tradition; is that correct?

A. Correct.

Q. Some follow the reconstructist tradition; is that correct.

A. Correct.

Q. Now, I think you already explained on direct that Lubavitch would come under the heading of those who follow the orthodox tradition; is that correct?

A. Correct, but not limited to.

Q. Are you saying that there are people who follow the Lubavitch tradition who would not be considered orthodox Jews?

A. That would consider themselves, that would look for advice to Lubavitch Rebbe, though not consider themselves orthodox Jews.

Q. So that all Lubavitch Jews are considered orthodox, but not all orthodox Jews are Lubavitch; is that correct?

A. If you—let me explain.

Q. Are you able to tell me if that's correct?

A. Well, depending on what you consider Lubavitch Jews.

Q. Do you, as a Lubavitch Rebbe, follow the pronouncements and the advice and the opinions of the chief Rebbe, who is known as the Lubavitch Rebbe—R-e-b-b-e?

[43]

A. Yes, I do, along with hundreds of thousands of other Jews throughout the world, whether or not they consider themselves orthodox, quote/unquote.

Q. I see. With respect to those Jews in the Pittsburgh area who follow the Lubavitch traditions, as a general

statement would you consider those people to be orthodox Jews, as opposed to reformed, conservative or reconstructionists?

A. Mostly orthodox.

Q. Now, it is true, is it not, that not all orthodox Jews follow the dictates or pronouncements of the Lubavitch Rebbe?

A. Correct.

Q. And indeed, within the group of Jews who follow—

A. May I, may I just add one more thing to that?

Q. Yes.

A. When talking about the dictates of the Lubavitch Rebbe, I'd like to rephrase that, rather than dictates, but advice and dealing with that with Lubavitch viewpoints, or messages that he relays, it isn't only limited to Lubavitcher or orthodox Lubavitchers.

Q. With respect to the Lubavitch Rebbe, you follow his opinion; do you not?

A. Yes.

Q. Indeed, you consider his opinion binding; do you not?

A. Yes.

Q. Now, getting back to types of orthodox Jews, is one branch [44] of people who follow orthodox Jewry known as Hassidic Jews or Hassidim?

A. Yes.

Q. And are the Lubavitch Jews one type of Hassidim?

A. Yes.

Q. But indeed, there are a number of subdivisions of Hassidim; are there not?

A. That's correct.

A. Nevertheless, when talking about many following the advice of the Rebbe, it isn't limited to his, to Lubavitcher study.

Q. With respect to Hassidim, there are at least nine subdivisions of Hassidim; are there not?

A. That's correct.

Q. And of those nine, the Lubavitch branch is one; is it not?

A. That's correct. However, many of those leaders of those other branches have come to the Lubavitch Rebbe to seek counsel and advice.

Q. With respect to the people who follow the Lubavitch tradition in Pittsburgh, is it a fact that they constitute perhaps three percent of the Jewish community here?

A. I'm not sure of the percentages, but perhaps so.

Q. Well, what is your estimate as to the percentages?

A. I don't of the figures on that.

Q. You know, do you not, that there is a synagogue where the [45] majority of Lubavitch families attend; is that correct?

A. That's correct.

Q. And with respect to that synagogue, what is the name of it?

A. Lubavitch Center.

Q. And at the Lubavitch Center there are approximately 100 perhaps 150 families who attend the synagogue at Lubavitch Center; isn't that correct?

A. That's correct.

THE COURT: If you can get him to concede on cross examination that the Hanukkah, rather the menorah has some religious significance, apparently that would be contrary to what he said on direct, but the make up of the population of the Jewish people in Pittsburgh and where they attend and the number I don't think are particularly important.

MS. LITMAN: Your Honor, what these questions go to is the weight that you should give to this witness' testimony with respect to his opinion as to whether or not a menorah is a religious symbol or fosters a religious purpose, and with respect to that, we think it's important for the, for you to see, Your Honor, and for the record to reflect what his opinions are based on, and as well demonstrates that it differs significantly, as you already know, from previous testimony.

But as I think you will hear from the testimony of this witness, that his opinions as to the law, as what it [46] provides and as to what is a religious symbol, are not the opinions held by the vast majority of Rabbis and experts in religious law with respect to the Hanukkah menorah. So that is why we have inquired as to the numbers of Lubavitch.

THE COURT: All right.

MR. SAUL: Your Honor, if I may—

MS. LITMAN: Excuse me. In addition to that, Your Honor, as I think will become apparent in the testimony, on cross examination it will be developed there is other

significance to my questioning concerning the Lubavitch traditions and the followers.

MR. SAUL: Your Honor, if I may, I've been patient throughout the questioning, but I, of course, share your objection to this.

THE COURT: I didn't make any objection, I just—

MR. SAUL: Your sentiments. This is basically irrelevant, and we're not here on a numbers game. Either is has religious significance or it doesn't. The extent of it, does it have other significance and so forth, that's the significance of it; not the numbers game.

THE COURT: We'll put it this way, we'll try to be patient and listen to the questions and answers. Go ahead, Mrs. Litman.

MS. LITMAN: Thank you, Your Honor.

Q. Thereby—now, with respect to the Lubavitch Rebbe, is it [47] correct that his name is Menachem Schneerson?

A. That's correct.

Q. And his principal headquarters is in Brooklyn, New York; is that correct?

A. That's correct.

Q. And it would be accurate to call him the spiritual leader of the Jews, as far as your concerned; is that correct?

A. Correct.

Q. It is certainly true, is it not, you would agree, that reformed Rebbes don't consider Menachem Schneerson to be their spiritual leader; don't you agree that that's true?

A. Nevertheless, I will.

Q. Do you agree that that is true?

A. I'd have to explain my answer.

Q. I would like to hear your answer if I may, first, Rabbi.

Do you agree that for the most part reformed rabbis do not consider that Menachem Schneerson is their spiritual leader; would you agree or not?

A. As far as spiritual leader, perhaps so. But nevertheless they also do seek his guidance and counsel. Not in every area, but in areas of their concern.

Q. I don't think you're answered my question.

MRS. LITMAN: Could the reporter please read back the question?

[48] I'll save the reporter some work here. You can answer the question, "yes", or "no". Do you agree that he's the religious leader. You could say, "yes, but", or "no, but", and we'll let you give a brief explanation.

A. Question again, please?

Q. Do you agree that reformed rabbis don't consider Menachem Schneerson to be their spiritual leader?

A. Yes, I agree. But they, nevertheless, seek his guidance.

Q. Do you agree that conservative leaders, conservative rabbis don't consider Menachem Schneerson to be their spiritual leader?

A. No, I don't.

Q. Now, with respect to the Lubavitch Rebbe, he has been the spiritual leader for the Lubavitch followers for over 40 years; is that correct?

A. Yes, approximately.

Q. Approximately 40 years; is that correct?

A. Yes, approximately. Yes.

Q. And he regularly gives messages to his followers; does he not?

A. Yes.

Q. In fact, his talks or messages are widely disseminated to his followers; isn't that correct?

A. Correct.

Q. And that's done orally by telephone or radio hook ups; is that correct?

[49]

A. Correct.

Q. And sometimes his talks or messages are transcribed in writing and sent to his followers; is that correct?

A. Correct.

Q. And indeed, there are times when the Lubavitch Rebbe has appeared and had his talks on cable television; isn't that right?

A. That's correct.

Q. And sometimes those talks go on for many hours; isn't that correct?

A. Correct.

Q. Incidentally, in what language are his talks given?

A. Generally in Yiddish. However, along with that there's always simultaneous translation in many, many languages, sometimes even ten languages.

Q. But in order for one to understand the Lubavitch Rebbe's messages as they are given from him personally, one would have to understand Yiddish; is that correct?

A. When it's given in Yiddish. I've heard it given in other languages as well, and I don't understand it.

Q. Now, you've already agreed that you consider the opinion of the Lubavitch Rebbe to be binding; is that correct?

A. Correct.

Q. You indicated, Rabbi Rosenfeld, that in checking on a question of Jewish law you consulted certain sources; is that [50] so?

A. Correct.

Q. With respect to those sources, would the Torah be one of the sources you would check?

A. Yes.

Q. And?

A. As a primary source.

Q. And the Torah, of course, consists of the five books of Moses; is that so?

A. Correct.

Q. Now, in addition to that, do you also consult a book called the Talmud?

A. Yes.

Q. And is that a book of commentaries on the law?

A. Yes.

Q. And then you referred also to something that you consult which you refer to as the Code of Jewish law?

A. Yes.

Q. And that in Hebrew is called the Schulchan Aruch; is it not?

A. Correct.

Q. And that sets forth what the laws are that govern the proper conduct of people who follow the Jewish faith; is that right?

A. That's correct, 100 percent.

[51]

Q. And you would agree that the laws set forth in the Schulchan Aruch, the Code of Jewish Law are binding; would you not?

A. That's correct.

Q. Incidentally, do followers of the Lubavitch Rebbe believe in the coming of the Messiah?

A. Definitely. It's one of the principles of faith that Hemonnes mentions.

Q. And you believe in the coming of the Messiah; do you not?

A. Yes.

Q. Do the writings of the Lubavitch Rebbe, are any of them collected in a book called the Tannya—T-a-n-n-y-a?

A. Yes.

Q. Is one of the things in which the Lubavitch followers believe the transmigration of human souls?

MR. SAUL: Objection. That's totally irrelevant. We've now gone very far ahead of the issue in this case, Your Honor.

THE COURT: I think that's right. I doubt if it will affect his credibility if he answered that either way. So we'll sustain the objection to that.

Q. Rabbi Rosenfeld, you feel, do you not, that when you follow the pronouncements of the Lubavitch Rebbe, that that equates with following the pronouncements of the Torah and thus will help to bring about the coming of the Messiah; isn't that [52] correct?

A. The Lubavitch Rebbe's pronouncements aren't any different than what the Torah tells us to do. He just relates to us what the Torah tells us to do. There's nothing new that he pronounces.

Q. What he relays to you that the Torah tells you to do, if you follow that don't you believe you will be helping to bring about the coming of the Messiah?

A. Correct.

Q. Now, you've given testimony concerning the menorah here, and you were asked a lot of question by counsel concerning a menorah, not limited to a Hanukkah menorah. So let me ask you this. Are you now saying here in court that a menorah is not, in your opinion, a holy and religious symbol in the Jewish faith?

A. Any menorah; is that what you're saying to me.

Q. A menorah, yes. Is there a menorah—your testimony is, as I understand it, is that a menorah has no significance.

THE COURT: In a public place. He said it had significance.

MRS. LITMAN: The Rabbi testified as well—

THE COURT: He said it had significance in the home.

MRS. LITMAN: Well, there he was talking about, there he was talking about a Hanukkah menorah. What I'm dealing with, Your Honor, is he said "a menorah", and there are, most [53] menorahs are not Hanukkah menorahs alone or not Hanukkah menorahs.

THE COURT: Well let him answer for himself.

A. Other than the menorah in the Holy Temple, the answer is they don't have any holy—what was the word you used? I'm sorry.

Q. The word I used was whether you agree that they were a holy, that whether you were stating that they were not a holy and religious symbol?

A. That's correct, other than the menorah that was in the holy temple.

Q. In other words, it is your testimony that a seven branch menorah is not a holy and religious, a holy and religious symbol; is that your testimony?

A. Ma'am, there isn't a seven branch menorah now that is a holy religious symbol.

Q. Rabbi Rosenfeld, when you have a menorah in a synagogue, a seven branch menorah in a synagogue at the Ark, is that not a religious symbol?

A. That's correct.

Q. That is not a religious symbol; in your opinion, that's not a religious symbol?

A. It is. Within itself, it is not.

THE COURT: I didn't hear you.

A. Within itself, the fact it happens to be a menorah doesn't [54] make it a religious symbol.

MR. SAUL: Just for purposes of clarification, I wonder if Mrs. Litman might consider that we're really talking about an eight branch menorah here. I think she's just misspeaking herself in referring to seven branch.

MS. LITMAN: I'm not misspeaking myself. I appreciate counsel's assistance, and I am not misspeaking myself.

THE COURT: She says that she's not mistaken. She appreciates your help, but she's not in need of it.

MR. SAUL: Okay. Just trying to make the record clear.

THE COURT: Go ahead, Mrs. Litman.

Q. Now it is true, is it not, that a menorah is mentioned in the Torah; is that correct?

A. That's correct.

Q. And indeed, you would agree, would you not, that a directive was given by God to Moses, according to the Torah, that the menorah be placed in the holy temple; is that correct?

A. That's correct.

Q. And when you speak of that menorah, you are speaking of the menorah that has seven branches; is that correct?

A. That's correct, different from the menorah of Hanukkah which is something entirely different.

Q. Right.

[55]

MS. LITMAN: Move to strike the nonresponsive part of the witness' answer, Your Honor.

THE COURT: Oh, we won't strike it. I won't attach much signifiance to it.

MS. LITMAN: Thank you, Your Honor.

Q. Now, Rabbi Rosenfeld, isn't it a fact that commonly menorah are placed within synagogues near or at the Holy Ark?

A. In some synagogues.

Q. I show you a photograph which has been marked for identification as Plaintiff's Exhibit 15 and ask you to examine that photograph of the interior of a synagogue in Europe, in Vonn—V-o-n-n—and ask whether in that photograph you recognize an object which is known as a menorah?

A. I recognize an object that is known as a menorah, as well as a candelabra.

Q. Is there an object there that is known as a menorah?

A. Yes.

Q. I'm going to ask you to take the red pen, and if you'll be kind enough to do so, Rabbi, would you please circle the menorah.

I show you now a photograph marked for identification purposes as Plaintiff's Exhibit 16 depicting a synagogue in Cologne, Germany, and ask you whether looking at that synagogue you recognize there an object or objects that are known as menorahs?

[56]

A. Yes.

Q. And how many are there, Rabbi?

A. Two.

Q. And are they at or near the Ark?

A. Pretty close.

Q. And when we speak of the Ark in a synagogue, will you agree that we are talking about the place where the holy scripture, the Torah, is kept?

A. That's correct.

Q. Similarly, on Exhibit 15 is the menorah placed in proximity to the Ark in that picture?

A. Yes.

Q. Now, would you be kind enough to circle the menorahs in the Exhibit 16.

Q. Rabbi, you are familiar with a number of congregations and synagogues in the Pittsburgh area; are you not?

A. Yes.

Q. Are you familiar with the Torah Hadum synagogue on Negley Avenue?

A. Yes.

Q. I show you a photograph marked for identify purposes as Plaintiff's Exhibit 17 and ask you whether you recognize that as a photograph of the Torah Hadum synagogue?

A. Yes.

Q. And what is the likeness which is carved in or shown on [57] the front of that synagogue in a prominent place?

A. There's a menorah placed on the building.

Q. Okay. Would you agree, Rabbi, that a menorah such as one sees on Exhibit 17 is something which is commonly associated with synagogues?.

A. It might be.

Q. Now is it your position that the only menorah which is a holy and religious symbol is the one that was originally placed by Moses in Jerusalem?

A. In the Holy Temple, that's correct.

Q. Would you agree, however, that the other menorahs that one commonly sees in synagogues today are based upon that original menorah ?

A. Not necessarily. As a matter of fact, the shape of the menorah one commonly sees is much different than the one that was originally in the Holy Temple.

Q. The menorahs which I have shown you in Plaintiff's Exhibits 15, 16 and 17, are common shapes of the seven branch menorah; are they not?

A. Yes.

Q. Now, it is your opinion, is it not, that a seven branch menorah is commonly looked upon by non-Jews as a symbol of Judaism; isn't that so?

A. Yes, and, no. Judaism as Jewish people; not necessarily Jewish religion.

[58]

Q. As I understand your testimony, you do agree that the Hanukkah menorah carries a religious symbol, is that correct, a religious message?

Is that correct?

A. In part.

Q. Well, you agree that it does carry such a message; is that correct?

A. Yes, it does, and precisely in someone's home.

Q. And it is correct, is it not, that it is a remembrance of a miracle that God performed; isn't that correct?

A. Yes, it is.

Q. And it is a remembrance of that miracle when it is lighted in places outside the home as well; isn't that true?

A. It can be.

Q. Well indeed, don't you agree that lighting it in a public place makes public that miracle that God did?

A. It probably would.

Q. It is intended to do so; is it not?

A. Along with other messages as well.

Q. Is the answer to my question, yes?

A. Yes, along with other messages as well.

Q. And the miracle that, that God performed is a miracle that he performed for the Jewish people; isn't that correct?

A. Specifically for the Jewish people, but it's normally performed for the world to observe and watch and take lessons [59] of.

Q. The people who were actually involved with that miracle that Hanukkah celebrates, they were Jews, weren't they, Rabbi Rosenfeld?

A. That's correct.

Q. And the oil that was kept for eight days when there was only enough for one day, that miracle concerned the oil that lit the menorah in the Temple; isn't that correct?

A. That's correct.

Q. And that Temple was where the Jews worshipped; isn't that correct?

A. That's correct.

Q. You spoke of certain acts which are designated as mitzvahs; is that right?

A. Yes.

Q. And it is your belief, and it is a tenet of the Jewish faith, is it not, that Jews are directed to perform mitzvahs?

A. Correct.

Q. And indeed, isn't it your belief that performance of a mitzvah helps to advance the coming of the Messiah?

A. Correct.

Q. Indeed, don't you believe that the performance of a single mitzvah could tip the balance and bring about the redemption?

A. That's correct.

Q. The lighting of the Hanukkah menorah in the home is a [60] mitzvah; is it not?

A. Yes.

Q. Now, as one of the followers of the Lubavitch Rebbe, you try, do you not, to listen to his talks and to read his messages?

A. Yes.

Q. And isn't it a fact that the Lubavitch Rebbe has given talks concerning the Hanukkah menorah?

A. Yes.

Q. And the Lubavitch Rebbe has given talks concerning the lighting of the Hanukkah menorah in public places; isn't that a fact?

A. Yes.

Q. And indeed, you yourself first heard such a talk somewhere around 1980; isn't that correct?

A. Correct.

Q. And there are publications of his speeches or directives that stem from about the, about the 1979 period up through the present concerning the lighting of Hanukkah menorahs in public places; isn't that right?

A. Correct.

Q. And when you heard Rabbi Schneerson talk about the lighting of the Hanukkah menorah in public places, isn't it a fact that you felt that he believed it was important to have Hanukkah menorahs lit in public places?

[61]

A. Yes.

Q. And isn't it true that you felt you wanted to attempt to do everything you could to follow his opinion and directives; isn't that correct.

A. Correct.

Q. You wanted to advance his preachings and his ideas; isn't that correct?

A. Correct.

Q. And you, you agree that with respect to the messages that the Hanukkah menorah relays, the messages that are relayed are the Jewish ways to relay the message; isn't that correct?

A. That's corrrect.

Q. And one of the things that the Lubavitch Rebbe said and that you believe was that a public lighting of the Hanukkah menorah makes public the miracle; isn't that correct?

A. That's correct.

Q. Now, not only you, but other Lubavitch followers of the Lubavitch Rebbe have participated throughout the United States in fostering the public lighting of Hanukkah menorahs; isn't that so?

A. That's correct.

Q. Now, as I understand your testimony, there are certain rules or laws that pertain to the lighting of the Hanukkah menorah; is that so?

A. That's correct.

[62]

Q. Some of the rules apply to lighting the Hanukkah menorah in one's home; isn't that so?

A. Yes.

Q. Different sets of rules or laws apply to lighting the Hanukkah menorah outside the home; isn't that correct?

A. There aren't any rules mentioned as to how the menorah outside of the home should be lit.

Q. In public.

Are you saying that there are no rules or laws dealing with how the Hanukkah menorah should be lit outside the home?

A. That is correct. There are customs.

Q. You do agree, do you not, that in the Code of Jewish Law, what you called the Schulchan Aruch, there is a provision that applies to the lighting of a Hanukkah menorah outside the home?

A. In a confirmation.

Q. There is such a law; is there not?

A. There is mention of a custom.

Q. And that's in the Code of Jewish Law; is that correct?

A. Right, specifically mentioned as not a law; however, it's a custom that some communities have.

Q. Well, it's within this Schulchan Aruch, the Code of Jewish Law that you teach; isn't that correct.

A. That's correct. However the Code of Jewish Law also mentions different customs that different communities have [63] become accustomed to do. This is one of them.

Q. Isn't it true that you consider the Schulchan Aruch provisions to be binding?

A. Yes.

Q. So that whatever you call it, the provision in the Schulchan Aruch providing for the lighting of the Hanukkah menorah outside the home is something that you would consider to be binding and follow; isn't that correct?

A. Schulchan Aruch states it as a custom. A custom means it doesn't have to be done; that the communities that have the custom to do it, to do it; whereas, Schulchan Aruch can state it has to be done, it's obligatory, then it's binding to do it.

Q. Rabbi, do you recognize the volume that I'm placing here before you as a volume of the Schulchan Aruch?

A. Yes.

Q. And do you see the inset provision?

A. Yes.

Q. Now, you and I spoke of the way in which to say, to make public or publicizing in the Hebrew language, and, indeed, I think you agreed that the word for that is what?

A. Pirsumay nissah.

Q. And pirsumay nissah means, does it not, making public the miracle?

A. That's correct.

[64]

Q. And that's what appears in the Schulchan Aruch; does it not?

Just tell me whether it appears here in the Schulchan Aruch.

MR. SAUL: Excuse me, could you clarify what she's talking about as far as it being?

MS. LITMAN: I'll give you the citation. Of course, I'm sure the Rabbi can give us the citation.

Q. Can you not?

A. I'm just not sure what you're asking. It—what do you want me to show you?

Q. Let me do it this way.

A. There's a lot of—

Q. I have made a photostatic copy of that book and highlighted the portion of which I am speaking.

Q. You see the highlighted portion I have marked there?

A. Yes.

Q. Can you tell me what the proper citation is for that?

A. What is stated is very clearly—

Q. No. The citation, what I mean is the number of the law.

A. The number of the law?

Q. How would you identify where it appears?

A. It's in what we call Seaman, it's in the section referring to Hanukkah and it's in 771, paragraph, paragraph seven, in the Ramaud.

[65]

Q. And would a fair translation in english of what is stated there in Hebrew or perhaps in Hebrew and Aramaic can read: And in the synagogue we place it on the southern wall, and we light and we bless in the synagogue because of pirsumay nissah making publicly known the miracle.

Would that be a fair translation?

A. It would be a fair translation. However, it needs to be taken within the context of what's said. Initially the Schulchan Aruch deals with the rules as to where it has to, where one is obligated to light the menorah, then the Schulchan Aruch goes on to explain that when one would put it in the synagogue, if one has that custom to, and when he does, he, the Schulchan Aruch goes on to explain where he would place that.

And then he can also make a blessing for it, because along with its messages it also carries a message of publicizing the miracle. However, the Schulchan Aruch goes on to say one cannot fulfill ones obligation of lighting a menorah by lighting one in the synagogue. That is not sufficient.

Q. Right.

A. He needs to go back home and light the menorah in his house to fulfill his obligation.

Q. If one makes public the miracle to the public as the Schulchan Aruch explains, one nevertheless has to light a menorah in his home; is that what you're saying?

A. That's correct.

[66]

Q. Okay. Now, with respect to the message that the Schulchan Aruch, the Code of Jewish Law that we just talked about with respect to the message that it talks about in that section, the message that it talks about is making public the miracle; is that correct?

A. That is correct.

Q. In your testimony on direct I noticed, Rabbi Rosenfeld, that you indicated that in the original sources directing Jews about lighting menorahs that they were to be placed at the door post, did you say; is that correct?

A. That's correct.

Q. And is that true because there was a desire or a directive that the menorah, the Hanukkah menorah be placed in such a place that it could be seen by the public or people outside the home?

A. Most importantly by people in the home; in addition, for people walking by to see it as well.

Q. And the purpose of having it at the door post was so that the people outside would be able to see it; isn't that correct?

A. That's correct.

Q. Now, with respect to the rules or the customs set forth in the Code of Jewish Law concerning the lighting of the Hanukkah menorah, isn't it a fact that the same rules apply to lighting the Hanukkah menorah that stands outside the Yeshiva, for [67] example, as apply at the City-County Building?

A. A menorah standing outside of a Yeshiva is not mentioned anywhere. It's for that reason that you would find very few of those menorahs around. Nevertheless, it's also something that's being done for the messages that it carries, and the way that is done is similar to the way that it's done in a synagogue.

Q. And with respect to whatever rules there are or customs there are, except for the fact that in a synagogue one might also light the Hanukkah menorah in the morning as well as at dusk, isn't it true take the same customs would be used for lighting the menorah in the synagogue, outside the synagogue, on top of the Yeshiva or at the City-County Building?

A. Except for one additional thing, which is that the question of whether one is permitted to make a blessing becomes more of a question when it's a public menorah outside of a synagogue.

Q. Yes. Well, indeed, you yourself have seen the chief Lubavitch Rebbe in Pittsburgh make a blessing on, at the public menorah on the steps of the City-County Building; isn't that correct?

A. Yes, I have.

MR. SAUL: Could I make one more stab at clarifying the record, and that is Mrs. Litman mentioned that chief Lubavitch Rebbe in Pittsburgh. I think that's somewhat
[68]
ambiguous as to whether or not she's referring to the Lubavitch Rebbe who's located in New York coming to Pittsburgh and lighting or does she mean a Lubavitch Rebbe located in Pittsburgh who lit it.

Q. Rabbi Rosenfeld, did you have some question in your mind as to what I meant?

A. Well, we're referring to, obviously, Rabbi Posner.

Q. Yes. And Rabbi Posner is the Rabbi who was sent here some 40 years ago by the predecessor of the current Lubavitch Rebbe; isn't that right?

A. That's correct.

Q. And the predecessor Lubavitch Rebbe who is now dead directed Rabbi Posner to come here and to open a Yeshiva; isn't that right?

A. That's correct.

Q. And Rabbi Posner, who follows the Lubavitch Rebbe's philosophy in preaching, came here and opened an Yeshiva; isn't that right?

A. That's correct.

Q. And he is the senior Rabbi in the Lubavitch movement here in Pittsburgh?

A. That's correct.

Q. And he was the Rabbi you were talking about who made the prayer; isn't that correct?

A. That's correct. However, the Lubavitch Rebbe has not done [69] directives on whether to make a rebra or not on the public menorah, whether or not to make a blessing.

MS. LITMAN: Your Honor, if I could just take a moment. I have a number of pamphlets that will make it a little simpler for counsel to follow.

THE COURT: Take your time.

Q. Now, getting back to the Lubavitch Rebbe's statements concerning the placing of public menorahs, in response to a subpoena which was served upon you directing that you gather together such pronouncements or writings that you could find, did you produce and bring here today certain writings, photographs, books and pamphlets that are involved with the Lubavitch Rebbe's talks and opinions concerning the public placements of Hanukkah menorahs?

A. Yes.

Q. Is one of the writings that you produced in response to the subpoena a book entitled, "Let There Be Light", sub-heading, "30 Days in the Lives of the Chabad-Lubavitch Lamplighters"?

A. Yes.

Q. I'm going to put that book before you and ask you to compare that book with these excerpts that are marked as Deposition Exhibit 4 and tell, tell me whether the exerpts come from that book and are reproduction, photostatic copies of the writings in that book.

[70]

A. Yes.

Q. Indeed, the last page contains a photograph of the Hanukkah menorah that was at the City-County Building here in 1985; is that right?

A. That's correct.

Q. The book which you have before you was published by whom?

A. Merkos L'inyonei Chinuch.

Q. What is that?

A. That is a Lubavitch publication house.

Q. Okay. And on the jacket does there appear an exerpt from a—let me withdraw that question.

On the jacket of that book is there some explanation of how that book, "Let There Be Light", came about?

A. Yes.

Q. The book was published in 1986; is that correct?

A. That's correct.

Q. And in the explanation on the jacket does it state "We must all become lamplighters, igniting the sparks that lie dormant in one another's hearts?

A. Yes.

Q. And is that the lamplighter phrase referred to on the cover?

A. Yes.

Q. And indeed, is it correct that Rabbi Schneerson asked his emissaries around the globe to submit reports to him and [71] photographs of their activities during the Hanukkah season in the Jewish year 5746—on our calendar 1985—did he request that?

A. Correct.

Q. And as a result of that his followers sent him various photographs and reports; did they not?

A. Correct.

Q. And a number of those photographs are contained in the book, "Let There Be Light"?

A. Correct.

Q. And as you look through the book, doesn't it set forth State by State photographs of the public displays and lightings of Hanukkah menorahs in the United States and elsewhere?

A. Correct.

Q. And indeed, there is such a photograph of what is going on, what was going on in 1985 in Pittsburgh; is that right?

A. Correct.

Q. And the photographs that are displayed are photographs that are meant to show Rabbi Schneerson and to have included in this publication what the activities are of his, or were during that season of his followers; is that correct?

A. Correct.

Q. Now, the artist's conception of a beacon of light on the front page is explained inside as a beacon of light illuminating the world with the light of Torah and mitzvot; is [72] that correct?

A. Correct.

Q. And mitzvot, you have already explained, are religious acts that Jews are directed to perform?

A. Correct.

Q. Now, in that book there is an article entitled, The Street Lamplighter, and a photograph of Rabbi Schneerson, the Lubavitch Rebbe; is that correct?

A. Correct.

Q. And it quotes that Rabbi Schneerson spoke of a Chassid as being like a street lamplighter; is that right?

A. That's correct.

Q. And the quotation from the Rabbi there where he quotes what is written is "A Chassid—and again, a Lubavitch is a type of Hassidic Jew; is that right?

A. Correct.

Q. And the Rabbi says, quote, there, "A Chassid is one who puts his personal affairs aside and sets out to light up the souls of Jews with the light of the Torah and mitzvot;" isn't that correct?

A. That is correct.

Q. And he states further in his quotation, "Jewish souls are ready and waiting to be kindled;" isn't that correct?

A. That's correct.

Q. On the next page, explaining more about the lamplighters, [73] does it recite that it is not enough to illuminate ones own life, but a Chassid has to exert himself to bring the light of Torah out to the farthest reaches of his influence?

A. Correct.

Q. And would you agree that that is true?

A. Correct.

Q. And you follow that preaching; do you not?

A. Correct.

Q. Isn't it true that in the month of Hanukkah, and particularly focusing in this book in the month of Hanukkah in 1985, that the Lubavitch Rebbe encouraged his emissaries to step up their activities and work even harder to spread the Torah?

A. The Lubavitch Rebbe does that on a continuous basis, not limited to that particular time.

Q. In the book on the heading "lamplighter" isn't it correct, and haven't I substantially quoted that the Lubavitch Rebbe in a public address asked his representatives to submit reports and photographs of their work over a period of approximately 30 days that included the Hanukkah period; is that correct?

A. Correct.

Q. And does it state there that the Rabbi encouraged his emissaries to step up their various activities that month, and to work with even more alacrity than usual in spreading the light of the Torah?

[74]

A. That's correct.

Q. Do you have the place there in your book?

A. Yes.

Q. And isn't it correct that among the areas that the Rabbi placed special emphasis on, it's recited that one of the areas that the Rabbi gave, the Rabbi gave special emphasis was public Hanukkah gatherings; is that correct?

Does it so state?

A. It's correct for the specific message that he mentions in his letter that I rely on as well.

Q. Does the book state, and I quote, "The Rebbe placed special emphasis on four areas of concern." Have I quoted it correctly so far?

A. Correct.

Q. And is one of those areas described in the book as "Public Hanukkah gatherings, particularly on the eighth day of Hanukkah"; is that what it says?

A. That's correct.

Q. Now, on the next page do you see the heading, A Month of Mitzvot?

A. Correct.

Q. And that means a month of these religious acts the Jews are to perform; is that correct?

A. Correct.

Q. And there does it state "Hanukkah is a particularly [75]
appropriate occasion for the kindling of lamps in the metaphorical sense of stirring the soul as well as in the literal sense"; is that what it says?

A. Yes.

Q. Again, there's a picture of the Lubavitch Rebbe?

A. Correct.

Q. Incidentally, is it true that a Talmudic scholar known as the Rashba stated in one of his responsa or interpretations of the law that it is a mitzvah to publicize anyone who performs a mitzvah?

A. That's correct.

Q. Do you agree with that?

A. Correct.

Q. And in this book put out by the Lubavitchers, do you see the section beginning with the paragraph, the second complete paragraph on the next page that reads, "and we pray"; you see that?

No, two more pages.

A. Yes.

Q. In talking about the accounts that are to be sent in of the Jews all over the world to the Rebbe, does it state "And we pray that these accounts will inspire others to lend their efforts to the all important work of spreading the light of Torah and mitzvot to each and every Jew, in keeping with the Talmudic dictum, quote 'one mitzvah brings along another,' " [75] end quote within quote, end quote.

Is that what it states?

A. Yes.

Q. And you do agree that spreading the light of Torah is a religious act; is it not?

A. Well, spreading the light of Torah can have several connotations.

Q. Can you answer my question first; do you agree that it's a religious act?

A. I need more explanation as to what—I mean, a religious act—

MRS. LITMAN: I will withdraw the question.

Q. Would you turn to that section in the book that shows the photographs in the Pittsburgh area that were gathered up and sent to the Lubavitch Rebbe; do you have that before you?

A. Yes.

Q. And on that page does it depict photographs of four locations erected by the Chabad house of Pittsburgh?

A. Yes.

Q. And indeed, the one on the right, that menorah, it indicates—is that the Jewish Community Center in the Squirrel Hill section of Pittsburgh; is that correct?

A. Correct.

Q. And you so recognize it; don't you?

A. Yes.

[77]

Q. And in the center it depicts the public menorah erected, the Hanukkah menorah erected at Yeshiva Achei T'mimim. That's where you're the principal; isn't that correct?

A. Correct.

Q. Of course, you recognize that; d you not?

A. Yes.

Q. On the left there is one at a student union; is that correct?

A. That's correct.

Q. And to the right, and the largest photograph on the page is the menorah in question here, the one outside the City-County Building in Downtown Pittsburgh; is that correct?

A. Correct.

Q. Now, in fact, you have witnessed the lighting of the Hanukkah menorah at the City-Council Building; have you not?

A. Yes.

Q. And you've already said you've heard the prayers recited by the Rabbi; isn't that correct?

A. Yes.

Q. And in the photograph that you have before you in the book, "Let There Be Light", indeed, we can see that there are flames, and the Hanukkah menorah has been lit; is that right?

A. That is correct.

Q. And if one were able to see closely, I think you can recognize, can you not, members of the Lubavitch community who [78] are standing there before the lighted menorah; isn't that right?

A. That's correct.

Q. When one makes the prayer at the Hanukkah menorah, isn't it true that one invokes the name of God?

A. That's correct.

Q. Now, with respect to the Hanukkah menorah at the City-County Building, directing your attention to that one, and the one at the Yeshiva, or, indeed, at the Jewish Community Center, they are identical in appearance; are they not?

A. Yes.

Q. And indeed, they are identical except for the size of the one at the City-County Building; isn't that true?

A. Yes.

Q. And the one at the City-County Building is bigger than the one at the Yeshiva; isn't that correct?

A. That's correct.

Q. Now, with respect to the messages, the messages that you can recite are historical and cultural, and the other messages that you enumerate that are carried by the Hanukkah menorah, would you consider it a fulfillment of Rabbi Schneerson's directive to make public the Hanukkah menorah, would you consider it a fulfillment of that to place the Hanukkah menorah on the steps of the City-County Building at any other time of the year besides Hanukkah?

[79]

A. No.

Q. Indeed, on your declaration that was filed and is part of this case you say that Hanukkah is analogous to the 4th of July, which celebrates political freedom; isn't that correct?

A. Yes.

Q. But you wouldn't consider it carrying the message properly to place it there July 4th; would you?

A. Correct.

Q. And that's because it has to be done during the religious observance of Hanukkah; isn't that true?

A. No.

Q. Isn't it a fact that the timing of the Hanukkah season is what, in your opinion, gives the significance to the Hanukkah menorah?

A. Yes.

Q. Rabbi Rosenfeld, there is a commentary to the Code of Jewish Laws that you recognize known as the Lavuch; isn't that correct?

A. Correct.

Q. And isn't it correct that in the Lavuch we find a writing that says when you bless a Hanukkah menorah in a public gathering this is a great proclamation to God?

A. I don't think that that's the precise quote.

Q. What do you think is the precise quote?

A. I think what he mentions there is pertaining to lighting, [80] he talks about pertaining to lighting it in the synagogue, referring to that part of Shunara that we just spoke about earlier, as well as lighting it in one's home facing the outside.

Q. And when he speaks of lighting it in the synagogue, he refers to that as a public gathering; does he not?

A. I don't recall the exact wording. I'd have to take a look at it.

Q. Do you recognize the volume I have put before you as what we were talking about, the Lavuch?

A. Yes.

Q. Again, let me give you a photostatic copy with highlighting, because, of course, it is written in Hebrew; is it not?

A. Yes.

Q. And referring to the discussion that we have made reference to, doesn't it indicate that when you light within, that is, not outside of the street, not outside, there is no proclamation of the miracle, and therefore,

it's customary also to light in the synagogue; that is, outside the home, Rabbi?

A. That's correct.

Q. And to bless them, the Hanukkah menorahs, because this is a public proclamation in a public gathering; doesn't it say that?

A. Yes.

[81]

Q. And the note that I have highlighted there indicates, does it not, fair translation would be, would it not, because there is in this a great proclamation to God and His holy name when we place in a public gathering; is that a fair translation of what it says?

A. That's correct. What he's referring to is when lights in the synagogue, as he continues on, that the purpose of this is because there maybe guests there that have no home of their own, the synagogue then becomes their home, and it's then that, for that reason they make the blessing and light the menorah.

Q. And that is a great proclamation to God?

A. Yes.

Q. And as I understand, the differentiation you made here, and you explained when you were answering Mr. Saul's questions, the differentiation you made was between the menorah which one had in the home and the Hanukkah menorahs which one had outside the home; isn't that correct?

A. As far as one's obligation to light a menorah, that is correct.

THE COURT: Let's break for lunch, shall we.

MS. LITMAN: Okay, Your Honor.

THE COURT: See you at 1:30.

Is that all right?

(Court recessed at 12:26 o'clock p.m.)

* * *

[82]

(Court reconvened at 1:40 o'clock p.m.)

THE COURT: I guess the witness can take the stand again.

RABBI YISROEL ROSENFELD resumes the witness stand.

MS. LITMAN: If Your Honor please, plaintiff has marked the referred to exerpts from the book, "Let There Be Light", published, as the witness has testified, by the Lubavitch printer in 1986. Plaintiff has marked those exerpts to which reference has been made as Exhibit 18 and offers them in evidence.

MR. SAUL: No objection, Your Honor.

MR. SPECTER: No objection.

THE COURT: Okay. We'll receive them.

MS. LITMAN: If Your Honor please, I am giving a copy of this to the clerk, but it may be that we have a more clear copy which I'd like the opportunity to be able to forward to the Court and exchange, if I may.

THE COURT: No objection.

MR. SPECTER: Mrs. Litman, I just noticed that the date at the top of these exhibits was wrong. I think that should be the 22nd.

MS. LITMAN: Did counsel want to make a statement concerning the withdrawal from the record of an

assertion made in the course of an objection about the demonstration on the City-County Building steps? I was told that counsel wished to [83] withdraw his assertion concerning the sponsorship of the Soviet Jewry demonstration; is that correct?

THE COURT: I can't hear a thing you're saying.

MS. LITMAN: I'm sorry, Your Honor. I had been told that counsel wanted to withdraw from the record his assertion that the American Defamation League had sponsored some kind of exhibit. If I'm wrong—

MR. SAUL: It's my understanding that is was the parent organization of the Anti-Defamation League, the B'Nai B'Rith, that sponsored it. We didn't mean to imply the Anti-Defamation League itself sponsored the demonstration, if that suffices.

CROSS EXAMINATION (Continued)

BY MRS. LITMAN:

Q. Now, Rabbi, with respect to the messages, whatever you consider they are, that you feel need to be given or are given by the Hanukkah menorah, is it correct, according to you view, that they need to be, these messages need to be given during the observance of Hanukkah?

A. The messages need to be given at all times, but they are given through the menorah during Hanukkah.

Q. When you say the messages need to be given at all times, are you talking about the messages of celebration of the miracle that Hanukkah performs?

A. I'm talking—excuse me. I'm talking about the messages [84] of a little bit of light dispersing a lot of

darkness; the messages of the minorities being allowed to practice as they wish.

Q. What I am talking about is, as I understand it, you don't, you testified that you don't feel you would be carrying out the pronouncements and the desires of the Lubavitch Rebbe to put the Hanukkah menorah with these messages that you now refer to on the steps of the City-County Building on July 4th; that is correct, isn't is?

A. That's correct.

Q. And as I understand it, you don't feel that that would be carrying out the desires or the messages of the Lubavitch Rebbe because it's not Hanukkah at that time; is that right?

A. That is right.

Q. And isn't it correct that the reason you believe that these messages need to be given during the religious observance of Hanukkah is because it's then that they have meaning; isn't that correct?

A. The messages that have meaning more so when given through the menorah.

Q. Rabbi, you, you recall having your deposition taken in this case?

A. Yes.

Q. And that was just a couple of days ago; was it not?

A. That is correct.

[85]

Q. And at that time you were there with your counsel; were you not?

A. That's correct.

Q. And you were asked questions and gave answers; is that correct?

A. That's correct.

Q. And you answered those questions truthfully according to the best of your ability at that time; is that correct?

A. Correct.

Q. Now, let me direct your attention to Page 73 of the transcript of that deposition.

MR. SAUL: Mrs. Litman, do you have an extra copy of that?

MS. LITMAN: No, I don't. I'd like to put one before the witness, unless you want to come up here and stand at the witness.

Q. And referring you there to Line 4—let's start on Page 72.

Can you agree, without going through the question that we were beginning to get into, why it wouldn't be satisfactory say, to place the Hanukkah menorah on the steps of the City-County Building on July 4th?

A. Yes.

Q. And you were asked, Question, Line 21, "And why not". And the answer you gave then is, "It's not Hanukkah"; is that [86] correct?

A. That is correct.

Q. And then, Question, "And would you explain why that would make a difference?" Answer, starting on Line 25 and going to the next page, 73, Answer, "Because the messages that the, all the messages that

the menorah carries need to come along with what took place on Hanukkah."

Question, "And do they need to be done, do those messages—when you say 'need', do they need to be given during the religious observance of Hanukkah?" Answer, "Yes. It's then that they have meaning."

Question, "And is it that time that imparts, or helps impart their meaning?" Answer, "Yes."

Now, does the record state as I have read it?

A. Yes.

Q. And are those the questions you were asked and the answers that you gave at the time?

A. Yes.

Q. And are they true?

Q. Yes.

Q. Now, in response to the subpoena with which you were served, did you produce a pamphlet entitled, Hanukkah, a Lesson in Religious Freedom?

A. Yes.

Q. Let me just get the original.

[87]

I put before you a pamphlet with that title and ask you whether that pamphlet was published in the year 1985, again, by the Lubavitch printers.

A. Yes.

Q. And is that a photographic chronicle of public Hanukkah menorah celebrations which were sponsored by Chabad Lubavitch in the United States of America.

A. Yes.

Q. And does that contain, again, photographs of Hanukkah menorahs that were publicly displayed in the United States?

A. Yes.

Q. And sponsored by the Chabad Lubavitch group?

A. Correct.

Q. Incidentally, the menorah which is used here at the City-County Building and which is displayed, the one that you observed being lighted a year ago, is that the property of Chabad.

A. Yes.

Q. But you don't put it up each year; is that right?

A. Right.

Q. You don't take it down?

A. Right.

Q. The City does that; is that correct?

A. Yes.

Q. You don't store it?

[88]

A. Correct.

Q. The City does that; is that correct?

A. Correct.

THE COURT: As I understand it—let me see if I can get one fact established here. As I understand it, your organization furnished the menorah to the City and asked them to put it up and take it down and keep it at the City-

County Building, so that each year at Hanukkah time they can put it up and take it down?

THE WITNESS: I'm not sure of the exact, how it came about, whether it was our asking for them to store it or their suggestion that they will store it. But that's basically what takes place.

THE COURT: But your organization at least owns it and furnished it?

THE WITNESS: Yes.

THE COURT: All right.

Q. Now, Rabbi Rosenfeld, would you agree that the Torah is the embodiment of the Jewish religion as given to Moses by God?

A. Yes.

Q. And you have already testified that mitzvahs are the religious acts that Jews are directed to perform; is that correct?

A. That's correct.

[89]

Q. Directing your attention to the photographic chronicle, you see the page which refers to, which starts, Hanukkah, the Festival of Lights, and it has the Lubavitch Rebbe's photograph?

A. Yes.

Q. Just to clarify the record, there is only one Lubavitch Rebbe at any one time; isn't that right?

A. That's correct.

Q. And indeed, that position is something which is passed on from one Rebbe to another; is that correct?

A. Correct.

Q. Is it correct that in that pamphlet—and I'm referring now to the third paragraph—is states, quote, "The Hanukkah lights remind us in the most obvious way that illumination begins at home within one's self and one's family by increasing and intensifying the light of the Torah and mitzvahs in the everyday experience, even as the Hanukkah lights are kindled in growing number from day to day," and I've quoted it correctly so far; is that correct?

A. That's correct.

Q. And then is goes on to say, "but though it begins at home, it does not stop there." Do you agree with that?

A. That's correct.

Q. And is says—and this is from a letter written by the Lubavitch Rebbe; is that correct?

[90]

A. Yes.

Q. It states, "Such is the nature of light that when one kindles a light for one's own benefit, it benefits also all who are in the vicinity. Indeed, the Hanukkah lights are expressly meant to illuminate the outside, symbolically alluding to the duty to bring light also to those who for one reason or another still walk in darkness."

A. Correct.

Q. That is what the Lubavitch Rebbe says?

A. That is Correct.

Q. And you agree with that?

A. Correct.

Q. Incidentally, on the following page that I have clipped—do you see the page I have clipped.

Q. Yes.

Q. Reference is made to what you and I talked about before with respect to where Jews were commanded to mount their menorahs at the outset; isn't that correct?

A. Correct.

Q. And the reference there indicates that Jews were commanded to mount menorahs, it says there, on the outside of his home; is that correct?

A. That's correct.

Q. Along public streets; is that correct?

A. That's correct.

[91]

Q. And to publicize the miracle; is that what it says?

A. That is correct.

Q. Do you agree with that.

A. Referring to, if you explain, referring specifically to the menorah lit within the home, on the outside of it.

Q. And do you agree with that?

A. Yes.

Q. And the statement of what is accomplished by publicizing it?

A. That's correct. And if you like to continue, the messages that it carries just in the line further—or should I—

Q. On the next page, is it correct that in the Lubavitch publication of 1985, at the very bottom of the page,

the quotation is, "A little light dispels much darkness," and it goes on to say, "May the light of the Hanukkah menorah always illuminate the pathways to serving God for all people of good will." Do you see that; do you see "Miracle of the Lights"?

Do you have that before you now?

A. Yes.

Q. And the quotation that I just made—do you see that last paragraph?

A. Yes.

Q. Does that—that quotation does appear; does it not?

A. Yes, it does.

Q. Do you agree with that?

[92]

A. Yes, I do.

Q. Would you say that, "The hope that the light of the Hanukkah menorah would always illuminate the pathways to serving God," would you agree that that is a religious purpose?

A. It's a purpose of freedom of religion.

Q. Would you agree that that is a religious purpose?

A. If you're referring to any type of religion; not specifically one type of religion.

Q. Would you agree that illuminating the pathways to serving God is not a secular purpose?

A. Yes.

Q. You would agree that that is not for the purpose of advancing—it doesn't have a secular purpose to advance.

A. Correct. That particular message, that particular message I stated.

Q. Now, do you want to refer to the page that has Rabbi Menachem Schneerson's picture with it headed, "Hanukkah, 5747-1984." do you have that?

A. Yes.

Q. And is there a reference there to some excerpts that a talk, of a talk that the Lubavitch Rebbe gave to children, thousands of children gathered in the synagogue at his headquarters in Brooklyn; is there a reference there to that?

A. Yes.

[93]

Q. And at that time does it state that the Rebbe in that talk said to the children, "Hanukkah teaches us that our mission is to illuminate the darkness of the world with the brilliant light of Torah and mitzvot"; does it state that?

A. Yes.

Q. Do you agree that that is a correct statement?

A. Yes.

Q. And when the Rebbe was saying, "our mission", was he talking about the mission of Jews?

A. That's correct.

Q. And when the Rebbe was talking about, "illuminating the darkness of the world", that the Jewish mission, that the mission of Jews is to illuminate it with the

brilliant light of Torah; Torah is, again, what we've agreed, the embodiment of the Jewish religion; is that right?

A. That's right.

Q. And again, mitzvot are the religious acts that Jews are commanded to do; is that correct?

A. That's correct.

Q. Does the Lubavitch Rebbe dictate, or pronounce that Jewish people should eat only kosher food?

A. The Torah pronounces that.

Q. And does the Lubavitch Rebbe agree?

A. Definitely.

Q. And do you agree?

[94]

A. Yes.

Q. And you follow that, don't you?

A. Yes.

Q. And you, you recognize, don't you, that there are many Jews who do not follow that custom or pronouncement?

A. Yes.

Q. Indeed, under the Lubavitch belief and assertion of the law, is it correct, for example, that a Jewish woman should not have a uncovered head, except in certain limited places, but certainly not in public places?

MR. SAUL: Objection, Your Honor. I think, again, we're getting far afield from the actual issue in this case.

THE COURT: I tend to agree. Now, I have no objection to going on indefinitely, but—

MS. LITMAN: I'm almost finished.

THE COURT: —I don't understand the purpose of that. I understand what you're getting at here. You're seeking to have this witness concede that the menorah has some religious significance.

I don't think his testimony differs very much from the Rabbi, and I forget his name, that testified for the plaintiffs last December. So, I don't know that there's any purpose in going into all the various details, but we'll let you finish out.

MS. LITMAN: Let me—

[95]

Q. Well, let me just ask you that question.

According to your interpretation of what Jewish law directs, is it correct that Jewish women in circumstances in public are supposed to keep their head covered?

A. Yes.

Q. And would you concede that many Jewish women don't follow that law?

A. Correct.

Q. Indeed, the majority of Jewish women don't follow that law?

A. Correct.

Q. Now then, with respect to interpretations of Jewish law, would you concede that there are interpretations as to which you disagree with the interpretations of the reformed rabbis?

A. Correct.

Q. And would you concede that there are interpretations of Jewish law as to which you disagree with conservative rabbis?

A. Correct.

Q. Would you concede that one of the differences in interpretation of Jewish law may be as to the Hanukkah menorah?

A. It could be.

Q. And to the extent anything in your testimony today might be at variance with Rabbi Staitman's testimony earlier in this hearing at an earlier time, that would be an area in which you [96] and he would disagree; is that correct?

A. Might be so.

A. Although, as was mentioned, it might be that we agree somewhat here.

Q. Incidentally, Rabbi Rosenfeld, does the Chabad or the Lubavitch community reimburse the City for its erection or storage of the menorah?

A. I don't think so.

Q. Rabbi Rosenfeld, do you feel that by the intervention of Chabad in this case, and by your appearance here as a witness on their behalf, that you are helping to further the desires and beliefs of the Lubavitch Rebbe?

MR. SAUL: Objection. It's irrelevant to the issues here.

THE COURT: I think that's right. You've asked him does he feel that he's furthering the beliefs of the Lubavitch; is that your question?

MS. LITMAN: Of the Lubavitch Rebbe, the spiritual leader.

THE COURT: I guess he feels, I guess he feels that he is furthering that, since he's here testifying. So, I think it's obvious. But we'll let him answer it.

A. That's correct. But not limited to just that.

MS. LITMAN: I have nothing further.

THE COURT: Anything else?

[97]

MR. SAUL: I have some brief redirect, Your Honor.

THE COURT: All right.

REDIRECT EXAMINATION

BY MR. SAUL:

Q. Just to clarify, the views you've expressed with respect to the menorah, are those solely those of the Lubavitch movement?

A. No.

Q. And based upon your readings and your education, what other branches would have authorities within it which would convey the same messages?

A. Many parts of Judaism.

Q. What other branches of Judaism, in terms of reform, conservative, remainder of orthodox?

A. I have seen a similar message stipulated by other orthodox Rabbis, conservative rabbis as well as reformed Rabbis.

Q. And the views, what about the views, you were asked about some views concerning the Messiah; is that something that's solely Lubavitch concept?

A. Not—Hemonnes, as I mentioned before, mentions it as one of the 13 principles of faith.

Q. And that's an authority that reform, conservative and orthodox would all look to?

A. To my knowledge.

Q. You were asked about the Hanukkah menorah appearing in the [98] synagogue. Are you aware of the star of David?

A. Yes.

Q. Okay.

THE COURT: Aware of what?

MR. SAUL: The star of David.

Q. Does the star of David ever appear in synagogues, to your knowledge?

A. Yes.

Q. And is the star of David sometimes used for secular purposes?

A. Yes.

Q. Such as?

A. Logos, symbols, whatever they may be, whether—just any symbol—

Q. Okay.

A. —somebody might want to use it for.

Q. Mrs. Litman asked you about the blessings that were, that are said at an, either in the home or out in public. Are those, those blessings—to your knowledge, are those blessings always said in public places such as the City-County Building?

A. Not always.

Q. And how long do the blessings take when you do say the blessings?

A. Approximately 15 seconds, 20 seconds.

[99]

Q. And with respect to Chabad, is Chabad involved in what we would generally term solely, quote/unquote, "religious activities", or are there other secular type activities that Chabad is involved in?

A. There are others as well.

Q. Could you briefly describe?

A. Such as we have many drug rehabilitation programs on campuses throughout the country; that matter, throughout the world. In whatever way trying to, in addition to that, make the world a better place for human beings in whatever way possible.

Q. Okay.

Now, Mrs. Litman asked you about the references to lamplighters contained in the book that she asked you about. Does the reference to "lamplighter" apply solely with respect to menorahs?

A. No, not necessarily. As a matter of fact, that statement was made many, many years before public menorahs became the thing to do. It was mentioned as a general statement pertaining to what Chassid does, not specifically for what the menorah symbolizes.

Q. And with respect to your testimony during cross examination as to spreading the light of the Torah, which is sometimes called the five books of Moses, is the spreading of that light supposed to be only to Jews, of the ethical [100] principles within the Torah?

MS. LITMAN: Which is the question?

MR. SAUL: I'll rephrase that.

Q. Are there ethical principles mentioned in the Torah?

A. Yes.

Q. The five books?

And what obligation, if any, do you consider Jews have with respect to those ethical principles?

MS. LITMAN: If the Court please, that's objected to as improper redirect. When I cross examined the Rabbi I cross examined him with respect to spreading the light of the Torah. We did not—and he agreed that that was the embodiment of the Jewish religion. We have had no discussion with the ethical principles in the Torah, and therefore, this is improper redirect, and it's irrelevant.

THE COURT: I think it's unnecessary. It may be relevant and it may even be proper redirect, but it's not necessary, and obviously all serious people of whatever religion are interested in the ethical principles they teach being followed. That's one of the purposes of the teaching of all religion, is to try to maintain in the world some semblance of order and morality and good will, and there's no need to further philosophize.

Go ahead.

MR. SAUL: Let me rephrase my question, then, and I'll [101] try to move off the subject.

Q. With respect to the universal messages that the Judge just referred to, the conveying of those messages within Judaism, is that only to be conveyed, those messages only to be conveyed to Jews?

MS. LITMAN: That's the same objection.

THE COURT: It's unnecessary also, because I know that they want those messages conveyed to the world.

MR. SAUL: Okay.

Q. Then specifically with respect to the spreading the light of the Torah, could you describe what duties—what you meant by the spreading of the light of the Torah?

A. Is your question as far as to the world, or as far as to Jewish people?

Q. Let's take specifically with respect to the world.

A. As the Judge mentioned, the morality and ethical values that we all want spread to the world to make the world a better place to live in.

Q. Okay. Let me quickly direct you to a few passages within the pamphlet that the, Mrs. Litman asked you about, "Hanukkah, a Lesson in Religious Freedom."

MS. LITMAN: The pamphlet is not in evidence.

THE COURT: I have one here, "Let There be Light".

MR. SAUL: I'm sorry. The witness has the pamphlets in front of him.

[102]

Q. I would direct you to the bottom of the first page where it has the picture of the Lubavitch Rebbe. Where it says, "Indeed, the Hanukkah lights are

expressly meant to illuminate the 'outside', symbolically alluding to the duty to bring light also to those who, for one reason or another, still walk in darkness." Does that refer just to Jews, or to all people?

A. To all people.

Q. The bottom of the next page, where it says, "A little light dispels much darkness," quote/unquote. "May the light of the Hanukkah menorah always illuminate the pathways to serving God for all people of good will."

Does that refer—again, does that refer to just Jews, or all people?

MRS. LITMAN: If the Court please, I'd just like to clarify. If this witness is being asked what the intention was of the writer, I don't think that he's competent to give that. I think he can give his opinion as to what he thinks it means.

THE COURT: No, I think that most any religious leader could state what the intention of a religious writer was, especially if he's steeped in the tradition of the religion. But, of course, the real answer is that the written exhibit here speaks for itself.

MR. SAUL: Okay.

THE COURT: You must assume that the Court can read and draw reasonable inferences from what the article says.

[103]

MR. SAUL: I'll withdraw the question. At this point I would like to mark that exhibit for identification. It's actually marked as Deposition Exhibit 5 at this point.

MS. LITMAN: That one is mine. Why don't you mark yours. You have your copy.

I'll be glad to lend counsel mine, but he has another copy. So I'm just going to ask if he'll return mine.

MR. SAUL: We'll arrange something with counsel, but I would like that marked as Intervenor Exhibit Number 5.

THE COURT: What is it that you want to call 5?

MR. SAUL: The brochure that's entitled, "Hanukkah, A Lesson in Religious Freedom". And I would move for its introduction.

MS. LITMAN: Your Honor, I have no objection to it if it is limited solely to the purposes have impeachment as it was used, or for the purpose of showing what the pronouncements are of the Lubavitch Rebbe.

To the extent it may have any hearsay declarations of fact, as to those, I would object to it.

THE COURT: Well, we'll receive it.

MR. SAUL: I have no further questions, Your Honor.

MS. LITMAN: I just have a couple of questions, Your Honor. I'll be very brief.

RECROSS EXAMINATION

BY MRS. LITMAN:

[104]

Q. With respect to spreading the light of mitzvot, that as I understand you believe you should do, do you spread that to non-Jews?

A. Mitzvot that, the action of the mitzvah itself, no, but perhaps the lessons that they may carry, yes.

Q. With respect to the laws as to what should be carried out, isn't it a fact, Rabbi Rosenfeld, that under your belief they should be carried out by Jews only?

A. Carried out, correct.

Q. The brief blessing that counsel asked you about on redirect for the Hanukkah menorah, would you say it, please?

A. (Blessing was recited by witness in Hebrew.).

MS. LITMAN: Let the record reflect that the Rabbi said the blessing in Hebrew.

Q. We can ask you to say it, say it, transliterate a little bit more slowly for the reporter later, but would you please translate it into English, but more slowly.

A. We are blessing God who has sanctified us and commanded us with mitzvots and has told us to light the candles of Hanukkah.

MS. LITMAN: I have no further questions.

MR. SAUL: One clarification point.

REDIRECT EXAMINATION

BY MR. SAUL:

Q. The Ten Commandments that we've all heard of, are those [105] examples of the 613 mitzvahs?

A. Yes.

MR. SAUL: Nothing further.

THE COURT: All right. I guess we're through with you. You can relax and step down.

MR. SAUL: Your Honor, I had not intended to call any other witness, but to make a long story short, I'm

afraid I will have to call one more witness, in light of the cross examination of this past witness, and for some brief, brief testimony.

THE COURT: All right. I assume no objection.

MS. LITMAN: No, I have no objection, except that I wasn't prepared for it, so I hope it's very short.

MR. SAUL: Intervenor calls Rabbi Yisrole Miller.

YISROEL MILLER, having first duly affirmed, testified as follows:

DIRECT EXAMINATION

BY MR. SAUL:

MS. LITMAN: If Your Honor please, may counsel be requested to move the podium, because he's got it right between me and the witness.

THE COURT: Sure.

MS. LITMAN: Thank you.

Q. Could you please state your name and address for the record.

[106]

A. Yisroel Miller—M-i-l-l-e-r.

Q. And are you a Rabbi?

A. I'm an orthodox Rabbi.

Q. And do you have a pulpit?

A. I'm the Rabbi of congregation Poale—P-o-a-l-e—Zedeck—Z-e-d-e-c-k—in Squirrel Hill.

Q. And in Pittsburgh, Pennsylvania?

A. Yes.

Q. Okay. The Poale Zedeck Synagogue, is that reformed, conservative or orthodox?

A. That's orthodox.

Q. Is it Lubavitch?

A. No.

Q. And briefly, could you give us your educational background?

A. I attended seminaries—

MS. LITMAN: Your Honor, I will stipulate that this witness is a Rabbi ordained in the orthodox tradition.

MR. SAUL: So stipulated.

MS. LITMAN: I would like to say, Your Honor, that I want to point out that the Court agreed to open the record for the presentation of Rabbi Rosenfeld's testimony, and, of course, that has been done. The reason I am not prepared, and I have no idea what Rabbi Miller will be testifying to, is because it was represented to me by counsel that he wasn't [107] going to call him. He has told, he has represented to the Court that it's on matters drawn, covered by me in cross examination that necessitates it. So I would hope that it would be limited to that and I wouldn't be forced to object as having been outside the announced scope.

Q. Now, your synagogue, is it an Hassidic synagogue?

A. No.

Q. What about you yourself, are you a Lubavitch Rabbi?

A. No, I'm not.

Q. Are you an Hassidic Rabbi?

A. No, I'm not.

Q. What group, then, do you represent, if you could describe it?

A. I'm an orthodox Jew, standard brand, who decided to become a Rabbi, and I try to base my teachings on the consensus of rabbidic tradition without regard to any particular teacher.

Q. Okay.

THE COURT: If your standard brand is like the standard brands in most other religions, I suppose a lot of people would have trouble understanding what a standard brand was; is that right?

THE WITNESS: I suppose so.

THE COURT: Yes, All right.

Q. Just in like a sentence or two, describe for us in your opinion the religious observance of the Hanukkah lights.

[108]

A. The basic religious observance of Hanukkah lighting is to light a minimum of one candle each night of the holiday. It's also customary, and the Talmud says it is meritorious to light one candle the first night, two the second, three the third and so on, lighting eight candles the eighth night.

Q. Now, you mentioned candles, but not the menorah.

What's the significance of the Hanukkah menorah?

A. To the best of my knowledge, there is no significance to the Hanukkah menorah whatsoever. The Talmud mentions lighting candles, and commentators to the Code of Jewish Law, the Schulchan Aruch, say that it's perfectly proper to stick a candle on a counter top. This would be a Jewish home. You could put it, with

the Judge's permission, next to the lamp and just put them up without any kind of container whatsoever.

Q. And the mitzvah would be fulfilled by lighting it in such a manner?

A. The mitzvah would be fulfilled completely, yes.

Q. To your knowledge, is the menorah used by some Jews as a ethnic, non-religious symbol?

A. Jews are both a religion and a people. The word "people" is vague, but that's the way we're often represented. Today there's also a Jewish State of Israel. In a desire to represent the Jewish people the search for tangible symbols has led to the use of the star of David, which is on the logo of many Jewish organizations, and the state of the State of Israel [108] or the menorah, which is often both of those are used, although they have a basis in religious tradition, both are used extensively by secular Jewish organizations to represent the Jewish people.

Q. And how would you classify the Hanukkah candle lighting by most American Jews today?

A. No one has taken a survey of all the attitudes of American Jews towards Hanukkah. But I have found, and my work has been with Jews of all background and levels of observance and the lack of it.

MS. LITMAN: Excuse me, Rabbi, and I apologize for interrupting in the middle of your answer. But it has become apparent, Your Honor, that the question deals with what is, what individual Jews, or what Jews are doing with respect to lighting the menorah. That is not the question here.

The question with which the Court is faced is what is the effect of the government having a Hanukkah menorah

on the steps of the City-County Building, what is the effect; does—what is the message that it conveys to those who see it, and therefore, I would object to the scope of his testimony as being immaterial to the issues before Your Honor.

THE COURT: Well, I think he was about to say what most people that he has talked to consider to be the significance of lighting the Hanukkah menorah. I suppose the real objection to that is that he can't say what other people [110]
think—

MS. LITMAN: That's exactly correct, Your Honor.

THE COURT: —based upon what they have told him. But it's apparent, it's apparent that both of these witnesses have said that the Hanukkah menorah itself has no particular religious significance, depending on the circumstances. I think that's the point of the testimony. So, I think we'll sustain the objection to what his constituents have told him.

MR. SAUL: Okay. Just have a couple more quick questions.

Q. Is the menorah lighting at a public place, such as the City-County Building, an act mandated or encouraged by Jewish law or Jewish religious custom?

A. No.

MR. SAUL: I have no further questions.

MS. LITMAN: Just a couple of questions, Rabbi.

CROSS EXAMINATION

BY MRS. LITMAN:

Q. With respect to those Jews who follow the orthodox tradition, it is correct, is it not, that the majority of orthodox Jews are not Lubavitch?

A. That's correct.

Q. Indeed, the majority of orthodox Jews are not Hassidic, isn't that—

A. That's correct.

[111]

Q. With respect to you yourself, do you consider the Lubavitch Rebbe, Rebbe Menachem Schneerson, to be your religious leader?

A. I consider him a religious leader.

Q. Right.

A. I do not consider him my sole or central religious leader.

Q. Would you consider his opinions or directives or statements to be binding upon you?

A. No.

Q. When you testified about the Hanukkah menorah, you are not presuming, are you, to testify as to what impression the lighting of the Hanukkah menorah at the City-County Building, what impression it communicates to passers-by?

A. I don't recall being asked that question.

Q. No, but I am asking you, you are not testifying as to what impression it would communicate to those who pass by and see it; are you?

THE COURT: Well, he wouldn't know that.

MS. LITMAN: That's exactly right. That's the point I'm trying to make.

THE COURT: That's an unnecessary question, because he has no idea what impression passers-by get.

MRS. LITMAN: I have no further questions.

MR. SAUL: No more questions.

[112]

THE COURT: Are we through?

I guess you can step down.

MR. SAUL: Your Honor, at this point I have nothing further, except there was a document that's been marked as Deposition Exhibit 2, which is quoted in part in one of the exhibits that's been moved into evidence. That is the brochure, "Hanukkah, A Lesson in Religious Freedom", and I would merely move that the entire letter be seen so that the entire message can be seen in it's total context. And I would mark that letter, which was previously marked as Plaintiff's Deposition Exhibit Number 2 as Intervenor's Exhibit Number 6.

THE COURT: Well now, as I understand it, you made Exhibit 5 the pamphlet, "A Lesson in Religious Freedom"?

MR. SAUL: Correct.

THE COURT: Why—is the letter attached to Exhibit 5?

MR. SAUL: The letter is quoted from, and the witness was, Rabbi Rosenfeld was asked about that excerpt and—

THE COURT: You mean the excerpts from the article?

MR. SAUL: From the letter. Excuse me.

THE COURT: Let me see the letter.

MS. LITMAN: Your Honor, I would like to point out to the Court that this letter is not authenticated. It has not been referred to. I mean, the fact that it's quoted, a piece of it is quoted in the pamphlet is meaningless. I don't think [113]
the letter even—

THE COURT: Wait till I understand. Is the letter quoted in the pamphlet?

MR. SAUL: Yes. And the witness was asked about that. That's, I believe, the same letter.

MS. LITMAN: I object to it's authenticity. I object that it is not the letter in it's entirety. And I object to it as hearsay.

THE COURT: Well now, you don't object to Exhibit 5, as I understand it?

MS. LITMAN: No sir.

THE COURT: And in Exhibit 5 there's a letter referred to, and part of it is contained in the Exhibit, but not all of it. Let me look at the exhibits and read them.

MS. LITMAN: We have no way to know whether it's referring to that same letter, Your Honor. There is no such testimony.

THE COURT: I think the pamphlet quotes the letter verbatim except the last two paragraphs.

MR. SAUL: That's correct, Your Honor.

THE COURT: And the last two paragraphs merely refer to United States, states that what is true of the individual is true of the nation, and it is the duty and privilege

of the nation to promote the forces of light for both home and abroad and steady the growing measure, and let us pray that the [114] message of Hanukkah lights will illuminate the everyday life of everyone personally and society at large.

I see nothing omitted in the pamphlet except the last two paragraphs, which don't add or detract anything. So, I think we'll just omit the letter and, for practical purposes more than anything else, and not bother making it a separate exhibit.

MR. SAUL: Very well, Your Honor.

MS. LITMAN: If Your Honor please, I would like to offer in evidence, there is a survey of Greater, of Greater Pittsburgh Jewish population dated 1984 which was prepared by the Jewish Community Federation, and it was a survey as to the Jewish population. Counsel has stipulated as to it's authenticity, and rather than offer the whole thing, I would ask the Court if it would accept from that, and perhaps counsel will stipulate that with respect to the number of Jews in Pittsburgh it indicates that there are 44,906 as of that time. And with respect to the number of persons of all ages who follow the orthodox tradition, there are 12.6 percent.

MR. SPECTER: The Court please, with all due deference to Mrs. Litman, I have not been consulted previously and I have not stipulated to the authenticity of it, and I object to it as pure hearsay at this time.

MS. LITMAN: Then we will offer it solely with respect to the intervenor, Your Honor, and ask that it be entered for [115] consideration as to that.

MR. SPECTER: I renew my objection because just because one counsel agrees to it it is not admissible.

MR. SAUL: Intervenor's position is, I told Ms. Litman we would stipulate to the authenticity of the document, but we believe it's totally irrelevant and would object to it's introduction. We're not involved in a numbers game here, and why are we—what is served by the recitation of the Jewish population solely of the City of Pittsburgh and the percentage of orthodox within the City of Pittsburgh. I mean, this is a national issue, there are Jews elsewhere in the United States, in the world, and how many Jews there are solely in the City of Pittsburgh and their make up is totally irrelevant.

MS. LITMAN: Your Honor, there, of course, lies one of the major differences in what intervenor believes to be the issue, because it, of course, is, with respect to the menorah, has the City of Pittsburgh violated the United States constitution by communicating a message that is not primarily secular, and therefore, the City of Pittsburgh is the only place that is relevant. The reason the make up of the Jewish population—of course, it's in by the witness already—but the reason for the submission of—

THE COURT: Let's get back to Rules of Evidence. I can't accept the survey here that's objected to if the author isn't here so that he can be cross examined as to his methods [116] in preparing the survey. So, strictly on the basis of the Rules of Evidence, since there's an objection I can't receive it. But, of course, the Rabbi who testified gave us the number of Jewish people in Pittsburgh. I don't know whether he gave us the percentage that were orthodox or not, or whether that really means anything. Of course, parenthetically, I'm not sure that any of this means anything to me in deciding the case. So, we'll not receive the survey. But we'll, of course, consider what the Rabbi said about population.

MS. LITMAN: Thank you, Your Honor. I have nothing further.

THE COURT: Now, let me ask you to state you posture here. As I recall it, on December 22nd, after hearing evidence, I merely refused to issue an injunction. And then I was told that there would be no necessity for another hearing because the plaintiffs and the defendants had stipulated there would be no additional facts, and the record should be closed so that the plaintiffs could take an appeal.

As I recall, during the hearing of December 22nd of 1986 the Chabad did petition to intervene, and I denied it on the basis of the plaintiff's objection, since the hearing was underway, but I did say before we closed the record that they could intervene for the purpose of introducing some testimony which we've heard today.

Now, as I understand it, the record should be closed. [117]
Obviously, there's no necessity for a permanent injunction, I suppose, at this time because the displays are no longer in existence. Since the holiday season has expired, the displays have been taken down. So, as I say there would be no necessity for a permanent injunction, unless it's requested that there be an injunction prospectively looking toward the next holiday season.

Of course, we don't know what those displays would consist of or what the law will be by the time we get to the next holiday season.

So, as I understand the posture you're in now, the record's closed, and you're in position to take an appeal; is that right?

MS. LITMAN: Well, Your Honor, the record is closed, but let me, and I believe when the Court issues an order we are in a position to take an appeal, but let me remind Your Honor that the plaintiffs requested in their request for relief a permanent injunction prohibiting the defendants from expending public resources—I'm reading

from the complaint, for the display of a creche and/or menorah and from storing, erecting, maintaining and displaying a creche and/or menorah on or in the Allegheny County Courthouse and City-County Building, and that the plaintiffs further requested a declaratory judgment, as is recited in Paragraph 1, which I don't have to enumerate, but it deals with our request that the Court declare the expenditure [118] of public finds and so forth in this case violates the First and Fourteenth Amendments.

So the request was for a preliminary injunction at that time, but also for a permanent injunction as well.

So, the record is closed, Your Honor, but I believe that the Court has to either make its previous order final or issue a final order granting or denying the permanent injunction and declaratory relief in order that we can then perfect an appeal.

THE COURT: I think you're right. I'll have to make some definitive order with respect to the request for permanent injunction and declaratory relief.

All right. Is there anything anybody else has to say?

*****

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HILARY SPATZ LEVINE, MAX A. LEVINE and MALIK TUNADOR,

Plaintiffs

v.

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania and the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania,

Defendants

Civil Action No. 86-2617

CHABAD,

Intervenor

MOTION TO CORRECT TRANSCRIPT

Intervenor Chabad and Appellants American Civil Liberties Union, Greater Pittsburgh Chapter, Ellen Doyle, Michael Antol, Reverend Wendy L. Colby, Hilary Spatz Levine and Max A. Levine hereby jointly request that the transcript in the above-captioned case by corrected as follows:

HEARING DATE OF DECEMBER 15, 1986

Page	Line	From	To
86	22	Hebrewan	Hewbrew Union

Page	Line	From	To
90	2	Mitzvots	Mitzvot
91	19	Manomonetis	Maimonides (delete or my)
95	17	review	the view

HEARING DATE OF APRIL 24, 1987

Page	Line	From	To
8	21	scene	sign
8	22	scene	sign
19	3	Borobeck	Boro Park
26	18	Massusad	Mezuzah
28	18	one	can be
36	5	nain	nun
36	6	nain stands	nun stands
36	6	nain means	nes means
39	8	antecedent	antithesis
39	15	consciousness	conscience
40	11	Halahau	Halacha
41	15	Rebbe	Rabbi
42	23	Rebbe	Rabbi
44	24	of	have
47	10	Rebbes	Rabbis
51	8	Hemonnes	Maimonides
55	12	Vann	Bonn
67	11	take	that
67	19	Rebbi	Rabbi
68	3	Rebbe	Rabbi
69	1	rebra	bracha
73	22	Rabbi	Rebbe
74	4	Rabbi	Rebbe
74	6	Rabbi	Rebbe (2 times)
97	20	Not—Hemonnes,	No. Maimonides,
107	16	rabbidic	rabbinic
113	25	and steady the growing measure	in a steadily growing measure

Counsel for all other parties have been contacted and have authorized the undersigned to state that they have no objection to this Motion.

Dated at Pittsburgh, Pennnsylvania, this 21st day of September 1987.

./s/.....
Counsel for Chabad

./s/.....
Counsel for American Civil Liberties Union, Greater Pittsburgh Chapter, Ellen Doyle, Michael Antol, Reverend Wendy L. Colby, Hilary Spatz Levine and Max A. Levine

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HILARY SPATZ LEVINE, MAX A. LEVINE and MALIK TUNADOR,

Plaintiffs

v.

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania and the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania,

Defendants

Civil Action No. 86-2617

CHABAD,

Intervenor

ORDER GRANTING MOTION TO CORRECT TRANSCRIPT

IT IS HEREBY ORDERED that the Motion to Correct Transcript, dated September 21, 1987, is granted.

Dated at Pittsburgh, Pennsylvania, this 21st day of September, 1987.

/s/.....
United States District Judge

(6) 5 5

Nos. 87-2050, 88-90, 88-96

Supreme Court, U.S.
FILED
NOV 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the
Supreme Court of the United States

October Term, 1988

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania and the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania, *Petitioners,*

and

CHABAD, *Petitioner,*

vs.

AMERICAN CIVIL LIBERTIES UNION GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HOWARD ELBLING, HILARY SPATZ LEVINE, MAX A. LEVINE and MALIK TUNADOR, *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Joint Exhibit Volume

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Petitioner, City of Pittsburgh, July 16, 1988
Petitioner, Chabad, July 15, 1988
Certiorari Granted October 3, 1988

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ACLU

American Civil Liberties Union
237 Oakland Avenue
Pittsburgh, PA 15213
(412) 681-7736

November 13, 1986

Richard S. Caliguiri, Mayor
City-County Bldg.
Pittsburgh, Pa. 15219

Dear Mayor Caliguiri:

As the holiday season approaches, the Greater Pittsburgh Chapter of the American Civil Liberties Union would request that the city and county refrain from erecting religious symbols in places of prominence in its buildings.

Last year the Menorah, which was hung on the front of the City-County Bldg., was ceremonially lit during each of the eight days of Chanuka, while the creche was displayed in an almost altar-like setting in the Courthouse. Our complaints to you at that time about the matter did not even receive the courtesy of a response.

We would urge you as government officials to recognize that one religion's symbol is another religion's heresy, and that government should not be involved in the support or establishment of any religious symbols.

Very truly yours,

Ellen Doyle, Esq.
President

ED:md

City of Pittsburgh
Richard S. Caliguiri, Mayor

Ellen Doyle, Esq.
President
American Civil Liberties Union
237 Oakland Avenue
Pittsburgh, Pennsylvania 15213

November 18, 1986

Dear Ms. Doyle:

With reference to your letter of November 13, 1986, it is my intention to allow a display similar to those of the past years at the City-County Building during this holiday season. As far as I know, the County Commissioners, the owners of one-half of this building, agree with this decision.

I respect your opinion and I would hope that you would respect mine along with many other Jews and Christians.

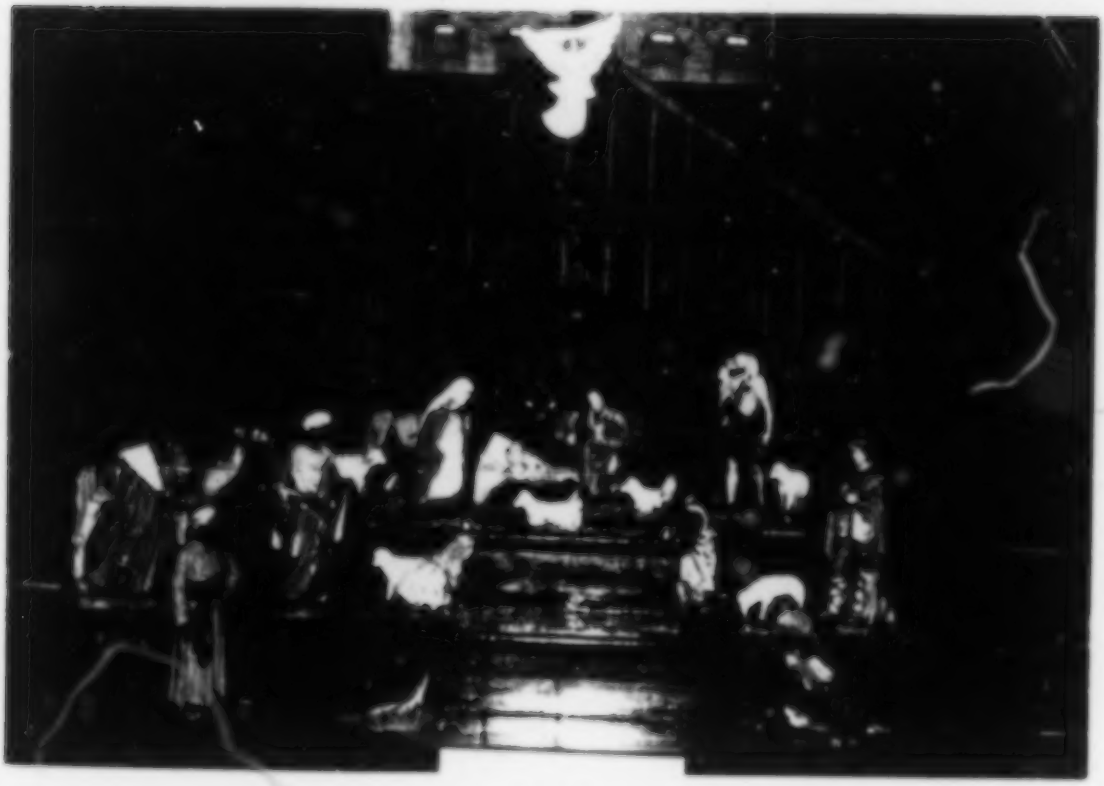
Very truly yours,

RICHARD S. CALIGUIRI

/gpk

PLAINTIFF'S EXHIBIT 2

EXHIBIT 3



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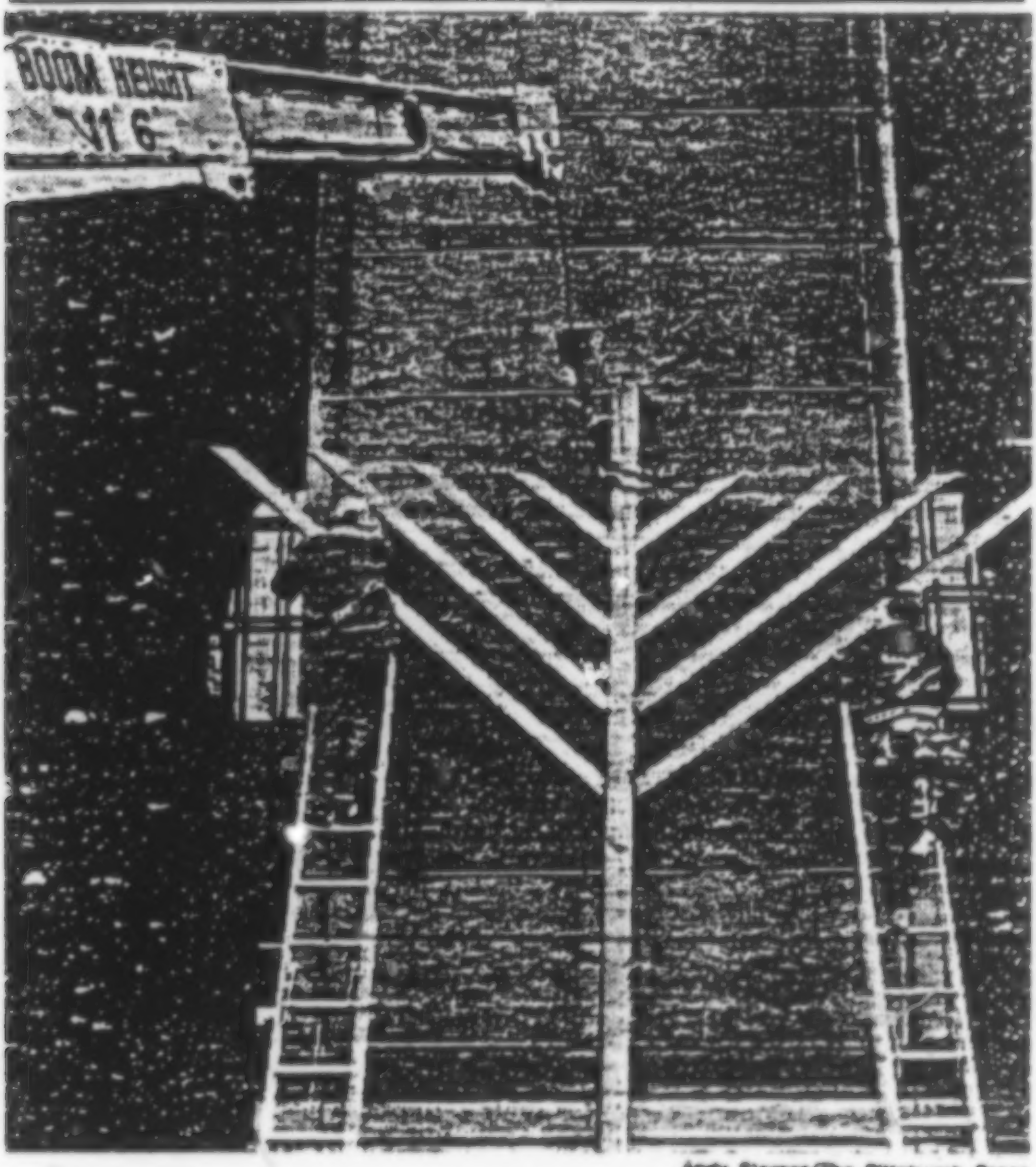
nday, December 22, 1986 The Pittsburgh Press

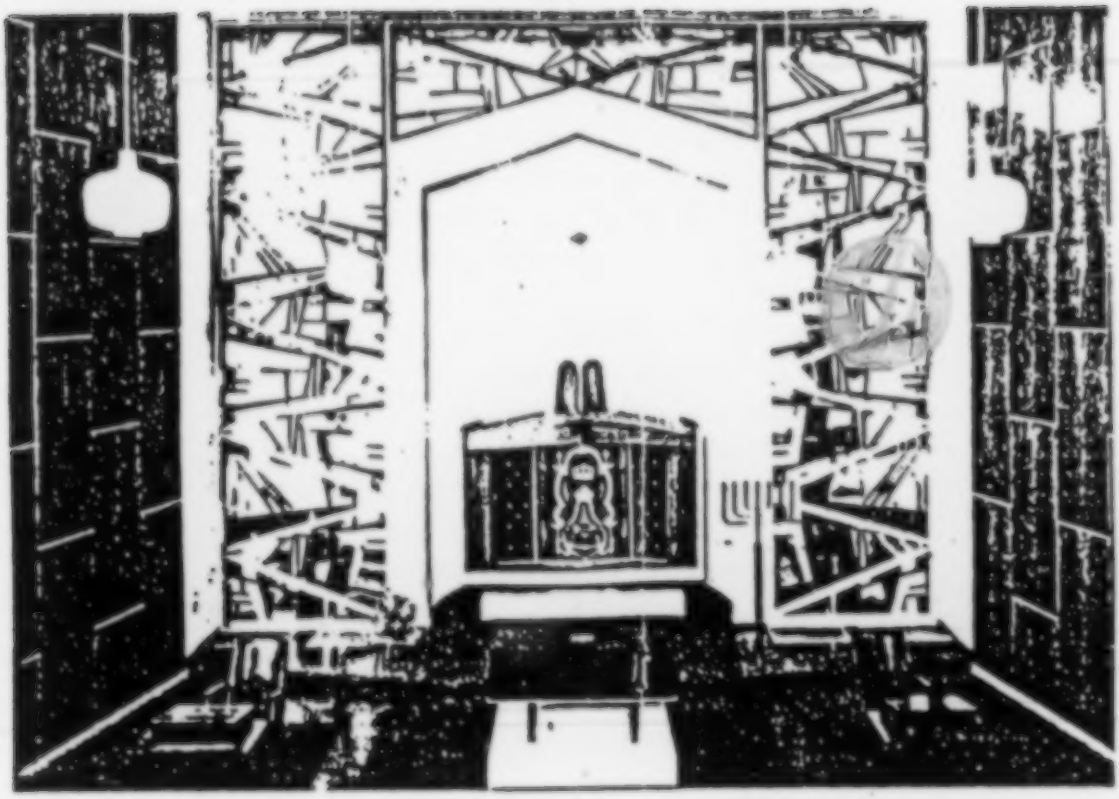


Andy Starnes/The Pittsburgh Press

Festival of lights

City employees today erected a menorah on the City-County Building, Downtown, for the Jewish holiday of Hanukkah, which begins at sunset Friday. A lawsuit by the ACLU failed to block the erection of the menorah and force removal of a Nativity scene in the County Courthouse. A federal judge refused to issue the order last Tuesday.

Plaintiff's Exhibit 14



227. *Bonn. Synagogue. Interior.*

hrum have a studied, plain design. The stained glass panels display large, abstract patterns (fig. 227).

Goldschmidt also was called upon to remodel a synagogue which had survived the war. The Roonstrasse synagogue in Cologne, which was built in 1899 by Emil Schreiterer in the Romanesque revival style, had replaced the Moorish Glockengasse synagogue of 1861. It was built to accommodate the population trend away from the old congested Jewish neighborhood. By 1957, the small group of survivors who had come to the city in 1945 had swelled to a community of one thousand members, making it one of the largest Jewish settlements in Germany today,[4] second only to West Berlin which has a Jewish population of well over 7,000.

EXHIBIT
1
Plaintiff's Exhibit 15

Goldschmidt decided to carve a social hall and other community facilities from the unwieldy structure. He divided the original hall of worship into two parts, horizontally, by putting in a floor at the gallery level (fig. 228). The domed part of the original structure thus became the main synagogue, seating four hundred men below and three hundred women on a cantilevered gallery.

Below the main synagogue is the social hall; with its adjoining subsidiary rooms, it accommodates four hundred persons. The ground floor contains offices, a room for youth activities, and a ritual bath; the weekday chapel is in the mezzanine.

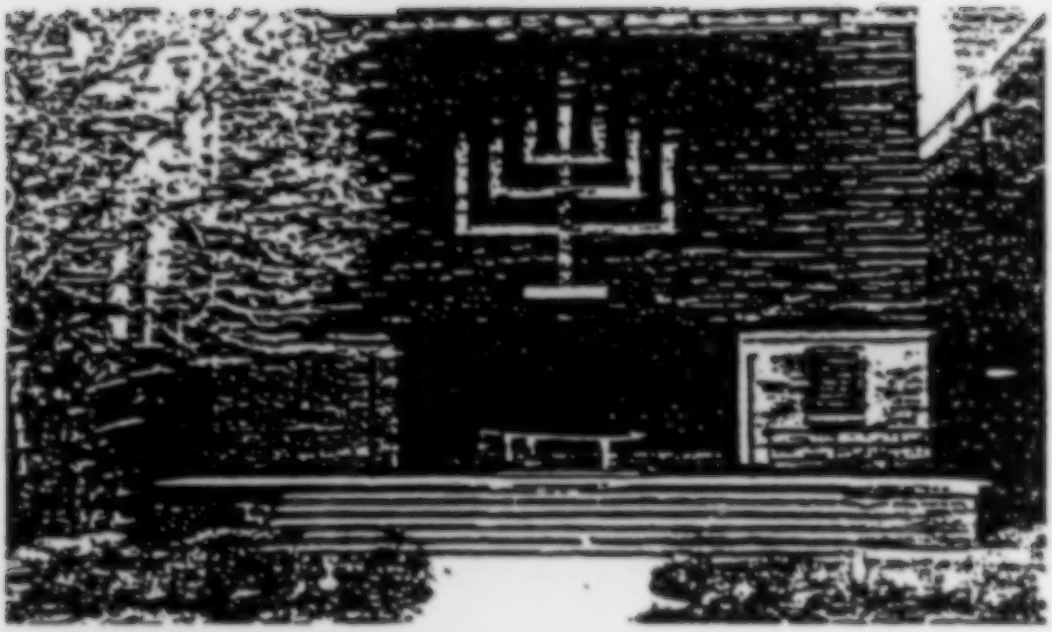
The synagogue was dedicated in 1959 to the memory of the 11,000 Jewish citizens of Cologne who perished in the Nazi holocaust.

Plaintiff's Exhibit 15

228. Cologne. Rommtrasse Synagogue, 1899. Interior as remodeled by H. Goldschmidt, 1919.

XHIBIT
11

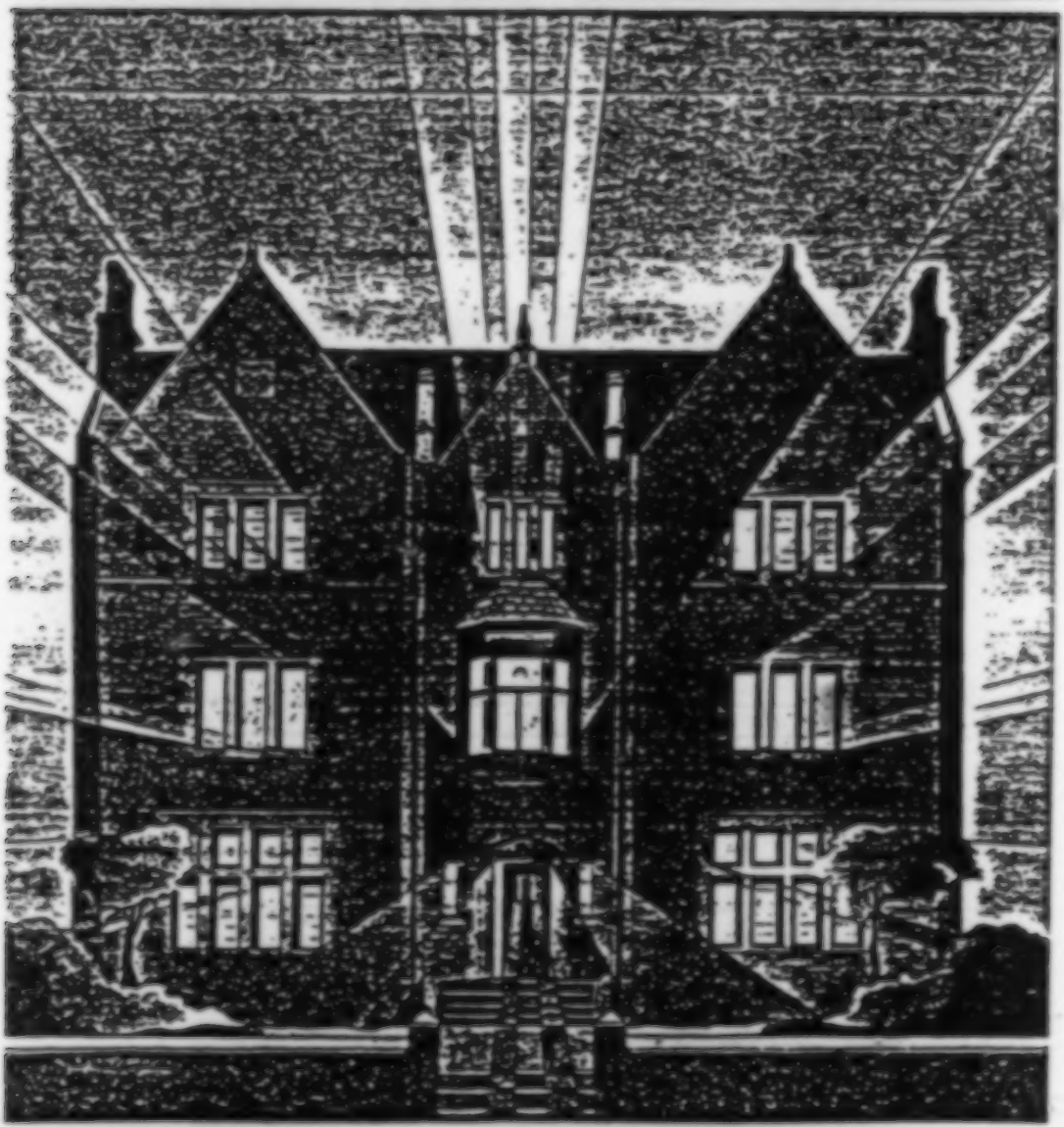
Plaintiff's Exhibit 16



Plaintiff's Exhibit 17

Let There Be Light

Thirty Days In The Lives Of The Chabad-Lubavitch Lamplighters



Part of Original

Plaintiff's Exhibit 18

DEPOSITION EXHIBIT 4

Let There Be Light

Thirty Days In The Lives Of The Chabad-Lubavitch Lamplighters

The soul of man," says King Solomon in the Book of Proverbs, "is the candle of G-d." Within each of us is the power to illuminate this world, to transform darkness into light. But just as a candle requires lighting before it can perform its function, our souls must be kindled before they can brighten up our lives, and illuminate the lives of others in turn. We must all become 'lamplighters', igniting the sparks that lie dormant in one another's hearts.

In a public address transmitted all over the world by special communications and satellite hook-up, the Lubavitcher Rebbe, Rabbi Menachem M. Schneerson שליט"א, asked his emissaries around the globe to submit reports and photographs of their activities during the Chanukah season of 5746 (1985). This volume, compiled and edited from those reports, is a pictorial chronicle of a world-wide movement that has become the most dynamic force in Judaism today—a living testimony to the efforts and successes of the Chabad-Lubavitch lamplighters.

THE COVER: 770 Eastern Parkway, Brooklyn, New York—an address that has become nearly as

familiar as 1600 Pennsylvania Avenue in Washington, D.C., or 10 Downing Street in London—houses the World Headquarters of the Chabad-Lubavitch movement. Seen in this artist's conception as a beacon of light, illuminating the world with the light of Torah and Mitzvot, the building is affectionately known as "770." Its official name is Beis Agudas Chasidei Chabad—Ohel Yossef Yitzchok-Lubavitch.

Cover artist Nachum (Neil) Waldman is the winner of numerous national and international awards for illustration and graphic design.

$3600

Geiger
Pittsburgh, PA

Let There Be Light

Thirty Days In The Lives Of The Chabad-Lubavitch Lamplighters

Published by
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19

The "Street-Lamp Lighter'

"...I was once privileged to hear from my father-in-law [Rabbi Yosef Yitzchak Schneersohn, the previous Lubavitcher Rebbe] that his father, Rabbi Shalom Dovber, of saintly memory, was once asked, 'What is a Chabad-Lubavitch Chassid?'

He replied, 'A Chassid is like a street-lamp lighter.' In olden days, there was a person in every town who would light the street-lamps with a light he carried at the end of a long pole. On the street-corners, the lamps were there in readiness, waiting to be lit; sometimes, however, the lamps are not as easily accessible. There are lamps in forsaken places, in deserts, or at sea. There must be someone to light even those lamps, so that they may fulfill their purpose and light up the paths of others.

It is written, 'The soul of man is the candle of G–d.' It is also written, 'A Mitzvah is a candle, and the Torah is light.' A Chassid is one who puts his personal affairs aside and sets out to light up the souls of Jews with the light of Torah and Mitzvot. Jewish souls are ready and waiting to be kindled. Sometimes they are close, nearby; sometimes they are in a desert, or at sea. There must be someone who will forgo his/her own comforts and conveniences, and reach out to light those lamps. This is the function of a true Chabad-Lubavitch Chassid.

The message is obvious. I will only add that this function is not really limited to Chassidim, but is the function of every Jew. Divine Providence brings Jews to the most unexpected, remote places, in order that they carry out this purpose of lighting up the world.

May G–d grant that each and every one of us be a dedicated 'street-lamp lighter,' and fulfill his/her duty with joy and gladness of heart."

Adapted from an address
by the Lubavitcher Rebbe,
Rabbi Menachem M. Schneerson [illegible],
on the 13th of Tammuz, 5722

The New York Times
Metropolitan Report

The Lamplighters

Nowhere in the modern world is the legacy of Abraham more in evidence than in the international activities of the Chabad-Lubavitch movement. With *Uforatzta!* as its motto, Lubavitch has been waging war against the forces of assimilation, helping Jews around the world to rediscover the eternal truths of Torah Judaism. "A Chassid," says the Lubavitcher Rebbe, "has to be a lamplighter." For the Chassidim, it is not enough to illuminate one's own life, or even one's immediate environs; a Chassid has to exert himself to bring the light of Torah out to the farthest reaches of his influence. Like a modern-day Abraham, the Chassid lights lamps wherever he travels, kindling the sparks that lie dormant in the souls of others, until those lamps burn brightly enough to illuminate still others, in turn.

To chronicle the full significance and influence of the world-wide Chabad-Lubavitch movement would be a prodigious, if not impossible task, and certainly far beyond the scope of this book. Since 1950 (5710), when the present Lubavitcher Rebbe, Rabbi Menachem M. Schneerson שליט"א, assumed the leadership of the Chabad-Lubavitch movement, it has continued to expand by leaps and bounds, and has become the most dynamic force in Judaism today. A detailed, comprehensive account of its accomplishments would fill volumes—nay, libraries—and would, in any event, be obsolete by the time it came off the press. This book, published at the behest of the Rebbe, is a *partial* chronicle of Chabad-Lubavitch activities; its focus

is on certain key projects, and on one specific period of time: The Chanukah season of 5746 (1985).

In a public address that was transmitted all over the world by special telephone and satellite hook-up, the Rebbe asked his representatives to submit reports and photographs of their work over a period of approximately thirty days, from the tenth day of the Hebrew month of Kislev, through Chanukah, to the tenth of the following month, Tevet. This was a month in which the Rebbe encouraged his emissaries to step up their various activities, and to work with even more alacrity than usual in spreading the light of Torah. The Rebbe placed special emphasis on four areas of concern: public Chanukah gatherings, particularly on the eighth day of Chanukah; *Tzivos Hashem*, a unique educational organization for young children; *Colel Tiferes Z'keinim–Levi Yitzchak*, study groups for senior citizens; and the Chabad-Lubavitch Houses, outreach centers in Jewish communities and on college campuses throughout the world. The present volume, then, is a pictorial album compiled and edited from these reports. For the omissions, whether inadvertent, or due to limitations of time and space, we apologize; in every city represented here, far more was accomplished than meets the eye. We are confident, however, that the reader will glimpse some of the enormous impact these activities have had around the globe.

In documenting these exemplary achievements, it may appear that we have overlooked many of the most vibrant and successful Chabad projects. Of course, we had no such intention. Every Chabad-Lubavitch outpost serves its community in *all* its needs, with a wide-ranging multitude of educational, religious and social services. Suffice it to say here that the day schools, yeshivot, Talmud Torahs, mikvaot, synagogues, summer camps, free loan funds, hospital chaplaincies, prison visitations, libraries, mitzva-mobiles, sukka-mobiles, Purim carnivals, Lag B'Omer parades, publications, radio programs, television broadcasts, seminars, Shabbatons, student outreach, counseling services, and mitzvah campaigns of the Chabad-Lubavitch movement all deserve volumes of their own.

A Month of Mitzvot

Chanukah is a particularly appropriate occasion for the 'kindling of lamps'—in the metaphorical sense of stirring the soul, as well in the literal sense. If the Chassidim of Chabad-Lubavitch are "lamplighters' all year round, during the Chanukah season their "wattage' is increased many times over.

The weeks immediately preceding and following Chanukah also bear special significance. The tenth and the nineteenth of Kislev are important dates in the history of Chabad-Lubavitch; they are Chassidic "festivals of liberation." In Czarist Russia, in the early days of the Chassidic movement, the founder of Chabad-Lubavitch, Rabbi Schneur Zalman, had been imprisoned on trumped-up charges of high treason. On the nineteenth of Kislev, 5559 (1798), he was released. Twenty-eight years later, Rabbi Dovber, his son and successor, was similarly accused, and was freed on the tenth of Kislev. These dates mark not just the personal liberation of these two great Jewish leaders, but the vindication of their teachings and the movement they established. As such, the commemoration of these festivals provides inspiration and impetus to Jews everywhere.

This month of intensified Chabad-Lubavitch activities culminated on the tenth of Tevet, a day which recalls one of the most tragic events in Jewish history: the onset of the Babylonian siege of Jerusalem. It is a public fast day, and its observance reminds us that we still live in the darkness of exile, that we must counter any threat to the wholeness of our faith, that we cannot rest until the darkness is banished by the light. By documenting some of the achievements of the Chabad-Lubavitch lamplighters in every far-flung corner of the globe during these thirty days, this chronicle will demonstrate that it *is* possible to illuminate the darkness, that even lamps which have long fallen into disuse are ready—indeed, they are eager—to be restored.

In encouraging the compilation and publication of this book, the Rebbe quoted the early Talmudic authority Rabbi Solomon ben Aderet—

known as the 'Rashba'–who stated in one of his Responsa that "it is a mitzvah to publicize anyone who performs a mitzvah." The men and women whose accomplishments are documented here have dedicated their considerable talents and energies to the great mitzvah of *ahavat Yisrael*–loving one's fellow Jew "as you love yourself" (Leviticus 19:18). It must be said, however, that the greatest merit belongs to the one man who is singularly responsible for strengthening the quality of Jewish life world-wide: the Lubavitcher Rebbe, Rabbi Menachem M. Schneerson, שליט"א. In truth, all the achievements of the movement he leads, are his.

The Rebbe epitomizes *ahavat Yisrael*. His compassion is boundless, his dedication to the individual and collective concerns of mankind unparalleled. In an age otherwise sorely lacking in leadership, the Rebbe has stirred the conscience of world Jewry, and set into motion the massive educational, social, and rehabilitative programs which continuously touch the lives of millions, Jews and non-Jews. His brilliant insight into the human experience and his endless flow of scholarly genius have won the admiration, respect, and awe of all who have come to know him. He is the foremost lamplighter of our generation, and all other lamplighters draw inspiration from him. We pray that he will go "from strength to strength," that G-d will grant him many, many, long, healthy and successful years as the leader of world Jewry.

And we pray that these accounts will inspire others to lend their efforts to the all-important work of spreading the light of Torah and mitzvot to each and every Jew, in keeping with the Talmudic dictum, "one mitzvah brings along another." Our sages teach that every deed a person performs generates a multitude of repercussions. The merit of mankind hangs in the balance, writes the Rambam (Maimonides); even a single mitzvah can tip the scales and bring Redemption, with the coming of Moshiach, whose arrival we await with eager anticipation, all day, every day.

This book is intended as a living testimony to the efforts and the successes of the Chabad-Lubavitch lamplighters. The Rebbe has said that we must all be lamplighters; and however impressive our achievements may have been until now, we are surely capable of accomplishing a great deal more. Our success is dependent only upon our will, and upon the strength of our resolve. By working together, by drawing inspiration from one another, we will, with G-d's help, make this world a better place in which to live...

"...and the world will be filled with the knowledge of G-d, as the waters cover the sea." [Isaiah 11:9]

The Ithaca JOURNAL

Weather forecast

Friday, Dec. 12, 1980 — 35 cents — A Gannett Newspaper — Founded 1815

Trumpeting Hanukkah's message of religious freedom, rabbi Eli Silberman holds a lighting of a menorah Thursday night on North Meadow Street. As Silberman and other friends watched, Michael Wasserman lit one of the eight oil lamps representing each day of the holiday.

Public invited to menorah lighting

Everywhere Ithacans go this month, they see Christmas trees and Santa Clauses and can hear Christmas carols and sing with the Mouse. But the eight to nine days Jewish Ithacans can go somewhere and see signs of their ancient holiday?

Ithaca's Chabad Jews have been sharing the Hanukkah tradition of lighting a menorah, an eight-branched candelabra, with passersby on Route 13 at Auburn Road since Saturday night.

Rabbi Eli Silberman of 112 Inlet Flats has been encouraging others to help kindle the oil flames of an eight-foot menorah at 6 p.m. each night on the front yard at 209 N. Meadow St., next to Byron Utter. The menorah is owned by Ithaca's Lubavitch Jews, who are building a "mini-mall," a retail headquarters, there.

The menorah will be lit again at 6 tonight and Saturday night.

Hanukkah is the celebration of the rededication of the second temple in Jerusalem in 165 B.C. It had been defiled by the Syrian king, who was trying to wipe out Judaism and whose efforts were followed by a revolt led by Judah Maccabee.

Remembering the temple restored that year and its burned candelabra, but there was only one cruse of unspoiled oil in Jerusalem. Though it only was supposed to last one day, long miraculously, the oil burned for eight days, long enough for more oil to be brought from another city.

To commemorate the event each year, Jews around the world light candles on a menorah, adding one more each night for eight nights, and one loaf from an oil.

LETTERS TO THE JOURNAL

Kindling the lights of Chanukah

Santa Claus, Christmas trees, Christmas plays, Christmas lights, Christmas carols, Christmas sales — one cannot move through the day without the constant reminder of Christmas. What is that like for a Jew?

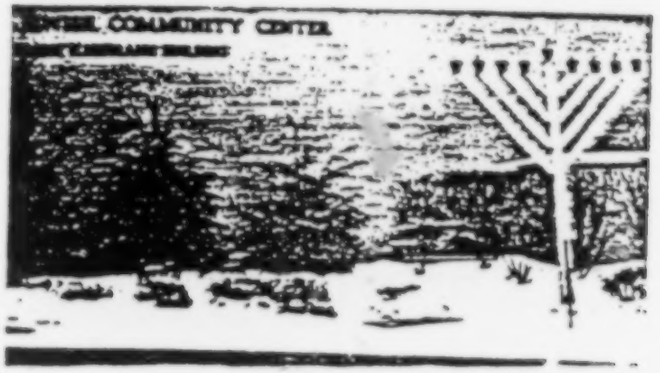
Well yes, the glitter is pretty, the excitement infectious. However, these months often leave me with a feeling of alienation, and at times anger, as I try to calmly explain for the hundredth time that no, Chanukah is not the Jewish Christmas.

But yesterday, as I was driving my son to nursery school, my heart skipped a beat when I stopped at the light on Meadow and Buffalo streets. There, for all to see, was my symbol, an affirmation of my faith. A large beautiful Menorah had been erected on the front lawn of 209 N. Meadow Street. I felt so proud, so recognized.

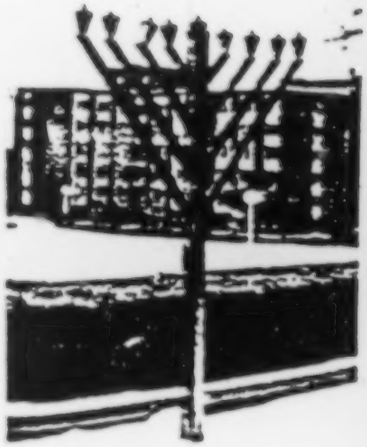
Now each night of Chanukah my family can go see the lights of Chanukah kindled. I want to thank Rabbi Silverstein for giving my children something to look at and say "Mommy, isn't that beautiful, it's Chanukah!"

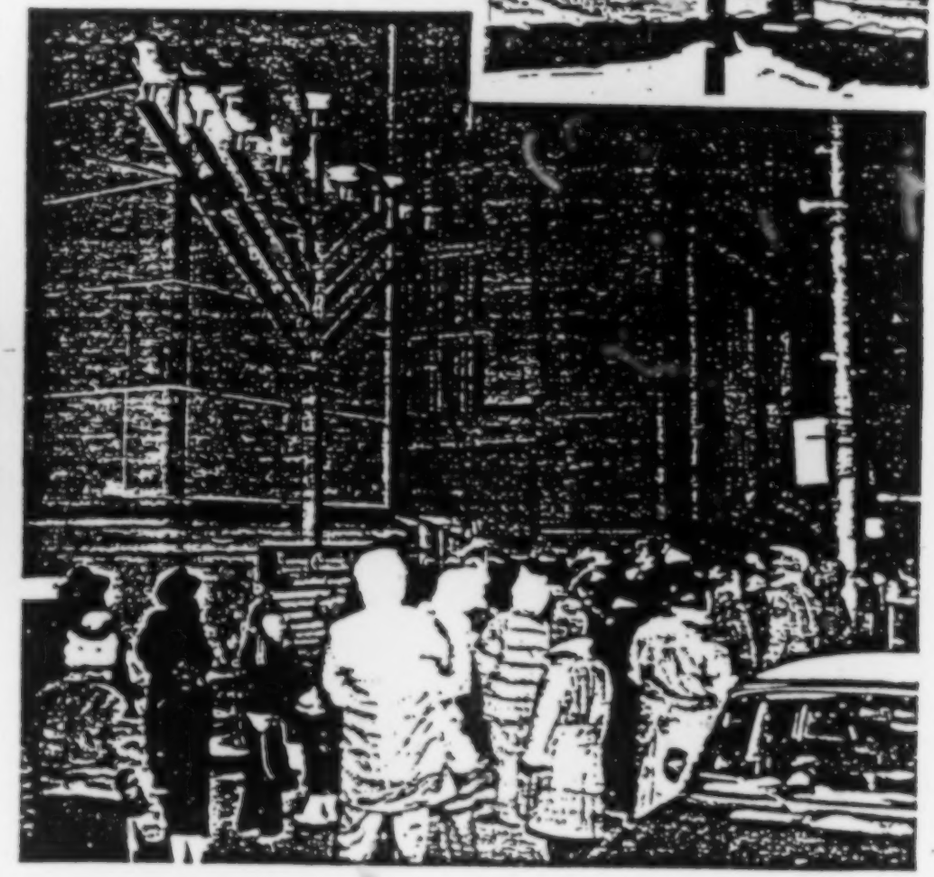
Marlaine Darfler

Ithaca



Among the many public menorahs erected by Chabad House of Pittsburgh...
Top right: At the Jewish Community Center in the Squirrel Hill section of Pittsburgh.
Center: At Yeshiva Achei T'mimim, overlooking the Interstate Highway and the Allegheny River.
Bottom left: At the Carnegie-Mellon University Student Union.
Bottom right: Outside the City-County Building in downtown Pittsburgh.





PETE FLAHERTY
COMMISSIONER

TOM FOERSTER
CHAIRMAN

BARBARA HAFER
COMMISSIONER

OFFICE OF COMMISSIONERS

County of Allegheny

119 COURTHOUSE • PITTSBURGH, PA 15219

December 2, 1986

Ellen Doyle, Esquire
President
American Civil Liberties Union
237 Oakland Avenue
Pittsburgh, PA 15213

Dear Ms. Doyle:

This is a response on behalf of the Board of County Commissioners to your communication concerning the Christmas scene on display in the Courthouse.

The nativity scene, the Hanukkah menorah, the seasonal decorations, the caroling program, the Christmas trees, and the observance of the national Christmas Holiday are all part of our community's seasonal celebration. The purpose of these displays and programs is to celebrate the Christmas and Hanukkah holiday season, which can be best summed up in the holiday wish of "Good Will to All Men".

These displays and programs are in no way an official or unofficial endorsement of any particular religion or religious message. The County has no interest in the advancement of one set of religious beliefs over any other set of religious beliefs.

Throughout the year, the Board of County Commissioners officially notes and publicizes many ethnic and religious holidays, symbols, and activities. The diversity of these events should strongly indicate the County's support of pluralistic beliefs in the community. The County will take no action to interfere with any citizen's free choice in religious matters.

In particular, the nativity scene is presented as a donation of the Holy Name Society and there is no direct expenditure of public funds towards the establishment of this display. The display is accompanied by a large and clear sign, which indicates the scene is donated by a private organization.

DEFENDANT'S EXHIBIT A

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A

County officials recognize that your organization has been a strong advocate for religious and cultural freedoms. Please rest assured that the Allegheny County Board of Commissioners joins with you in pursuit of the vital national goal of religious freedom.

Sincerely,

Tom Foerster, Chairman

Pete Flaherty, Commissioner

Barbara Hafer, Commissioner

1980 Allegheny County Christmas Carol Program

(Courthouse Grand Staircase)

DATE	TIME	SCHOOL OR GROUP	DIRECTOR	NUMBER
Wed., Dec. 3	12:00-1:00	Quaker Valley High School	Mr. Paul E. Timcheck	98
Thurs., Dec. 4	12:00-1:00	North Allegheny High School	Mr. Roland Dollhoph	55
Fri., Dec. 5	12:00-1:00	North Allegheny String Ensemble	Mrs. Chris Loverti	23
Mon., Dec. 8	12:00-1:00	Keystone Oaks Middle School Symphonic Band	Mr. Robert Bononi	50
Tues., Dec. 9	11:30-12:15	Moon High School	Mr. Albert Hazeem	60
Wed., Dec. 10	11:00-12:00	Penn Hills High School	Mrs. Carolyn Staymates	60
	12:15-1:00	Pittsburgh High School for the Creative and Performing Arts	Mrs. Birdie Nichols	46
Thurs., Dec. 11	11:00-12:00	Carlynton High School	Ms. Mary Erdeljac	25
	12:00-1:00	Hampton High School	Mr. Robert Sadler	30
Fri., Dec. 12	11:30-12:15	Elizabeth Forward High School	Mrs. Harriet Colebank	63
	12:15-1:00	Westinghouse High School	Linda Ross Broadus	50
Mon., Dec. 15	11:00-12:00	Ingomar Middle School Orchestra	Mrs. Patricia Bauer	35
	12:00-1:00	Shaler High School	Mrs. Karen Frederick	55
Tues., Dec. 16	11:30-12:15	Allegheny County Senior Citizens	Mrs. Betty Hughes	25
	12:15-1:00	John A. Brashear High School	Miss Louise Hermesky	36
Wed., Dec. 17	11:30-12:15	Baldwin High School	Mrs. Judy Schiavi	47
Thurs., Dec. 18	11:30-12:15	Montour High School	Mr. Clement Robin	60
	12:30-1:30	Anathan House Choral Group	Ms. Jean C. Grossman	21
Fri., Dec. 19	11:00-12:00	Seneca Valley High School	Mrs. Mamie Latagliata	55
	12:00-12:45	Springdale High School	Miss Virginia Campbell	48
Mon., Dec. 22	11:00-12:00	Plum High School	Mrs. Janet Zegar	40
Tues., Dec. 23	11:00-12:00	Riverview Chorus and String Ensemble	Mr. Bruce Knapp	20
			Miss Barbara Hepner	4
Tues., Dec. 23	12:00-1:00	St. Raphael's Elementary School Band	Mr. Gus Dolphi	40

1986 Allegheny County Christmas Choir Program

GREATER PITTSBURGH INTERNATIONAL AIRPORT
(Main Rotunda)

DATE	TIME	SCHOOL OR GROUP	DIRECTOR	NUMBER
Wed., Dec. 3	3:00-4:00	Quaker Valley High School	Mr. Paul E. Timcheck	98
Thurs., Dec. 4	7:00-8:00	Hampton High School	Mr. Robert Sadler	30
Fri., Dec. 5	7:30-8:15	Tarentum Community Childrens Choir	Mr. William Tilman	18
Wed., Dec. 10	1:30-2:30	Penn Hills High School	Mrs. Carolyn Staymates	60
Fri., Dec. 12	6:00-7:00	Carson Middle School String Ensemble	Mrs. Chris Loverti	40
	7:00-8:15	People of God Community	Mr. Robert Tedesco	15
Sat., Dec. 13	2:00-4:00	Keepsake	Robin Park	10
	8:00-9:00	St. Lukes (Carnegie)	Ms. Mary Erdeljac	25
Sun., Dec. 14	3:30-5:30	Gospel Joy Belles	Evelyn Dunkin	15
Mon., Dec. 15	12:00-1:00	St. James Elementary School (Sewickley)	Mrs. Linda Wallace	35
Tues., Dec. 16	11:00-12:00	Montour High School	Mr. Clement Rolin	60
Wed., Dec. 17	6:30-8:00	St. Margaret Mary Church	Elly Bartels	25
Fri., Dec. 19	8:00-10:00a.m.	Jeannie Allen	Jeannie Allen	5
	11:30-12:30	Shaler High School	Mrs. Karen Frederick	55
	1:45-2:30	Springdale High School	Miss Virginia Campbell	48
	6:00-7:00	North Allegheny High School	Mr. Roland Dollhoph	55
Sun., Dec. 21	2:00-4:00	Wildwood Chapel	Katsie Radovich	20
	4:00-5:30	Rejoice	Phyllis Clark	20
Mon., Dec. 22	7:00-8:30	Sonshine Praise	Kathy Herter	15
Tues., Dec. 23	2:30-3:30	St. Raphael's Elementary School Band	Mr. Gus Dolphi	40

NEWS OF ALLEGHENY COUNTY

COMMUNICATIONS DEPARTMENT • 409A COURTHOUSE • PGH., PA. 15219 • 412-355-5312 • GEORGE N. THOMAS, DIRECTOR

DEFENDANT'S EXHIBIT

PETE FLAHERTY TOM FOERSTER, Chairman BARBARA HAFER
BOARD OF COUNTY COMMISSIONERS

NEWS RELEASE: NOVEMBER 20, 1986

For the 19th consecutive year, the 98-member Quaker Valley High School Choir, under the direction of Paul E. Timcheck, will join the Allegheny County Commissioners in launching their Annual Christmas Carol Program on the Grand Staircase of the County Courthouse, Wednesday, Dec. 3, at noon.

Commissioners Tom Foerster, chairman, Pete Flaherty and Barbara Hafer, have invited high school choirs and other musical groups--more than 1,700 voices, to gather at the Courthouse and in the Main Rotunda of Greater Pittsburgh International Airport, to sing carols throughout the holiday season.

The program is dedicated to world peace and to the families of Prisoners of War and those Missing In Action in Southeast Asia.

The public is invited to attend the free concerts, which are amplified over the carillon speakers in the Courthouse tower so that thousands of shoppers and lunch-hour crowds on the street also may enjoy the entertainment, from 11:30 a.m. to 1 p.m., weekdays through Dec. 23.

At the Airport, concerts may be heard throughout the day, every day, through Dec. 23.

The setting for the holiday music festival at the Courthouse will be a manger set loaned to the County by Fr. Paul E. Yurko of Divine Redeemer Church, Ambridge. Fr. Yurko also is Director of the Holy Name Society of the Diocese of Pittsburgh.

The Allegheny County Bureau of Cultural Programs will decorate the Courthouse with fresh greens and poinsettias, and beautify the fantastic arched windows with magnificent wreaths.

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(EDITORS/NEWS DIRECTORS--ATTACHED FOR YOUR LOCAL INTEREST IS A COMPLETE SCHEDULE OF THE ALLEGHENY COUNTY CHRISTMAS CAROL PROGRAM FOR 1986.)

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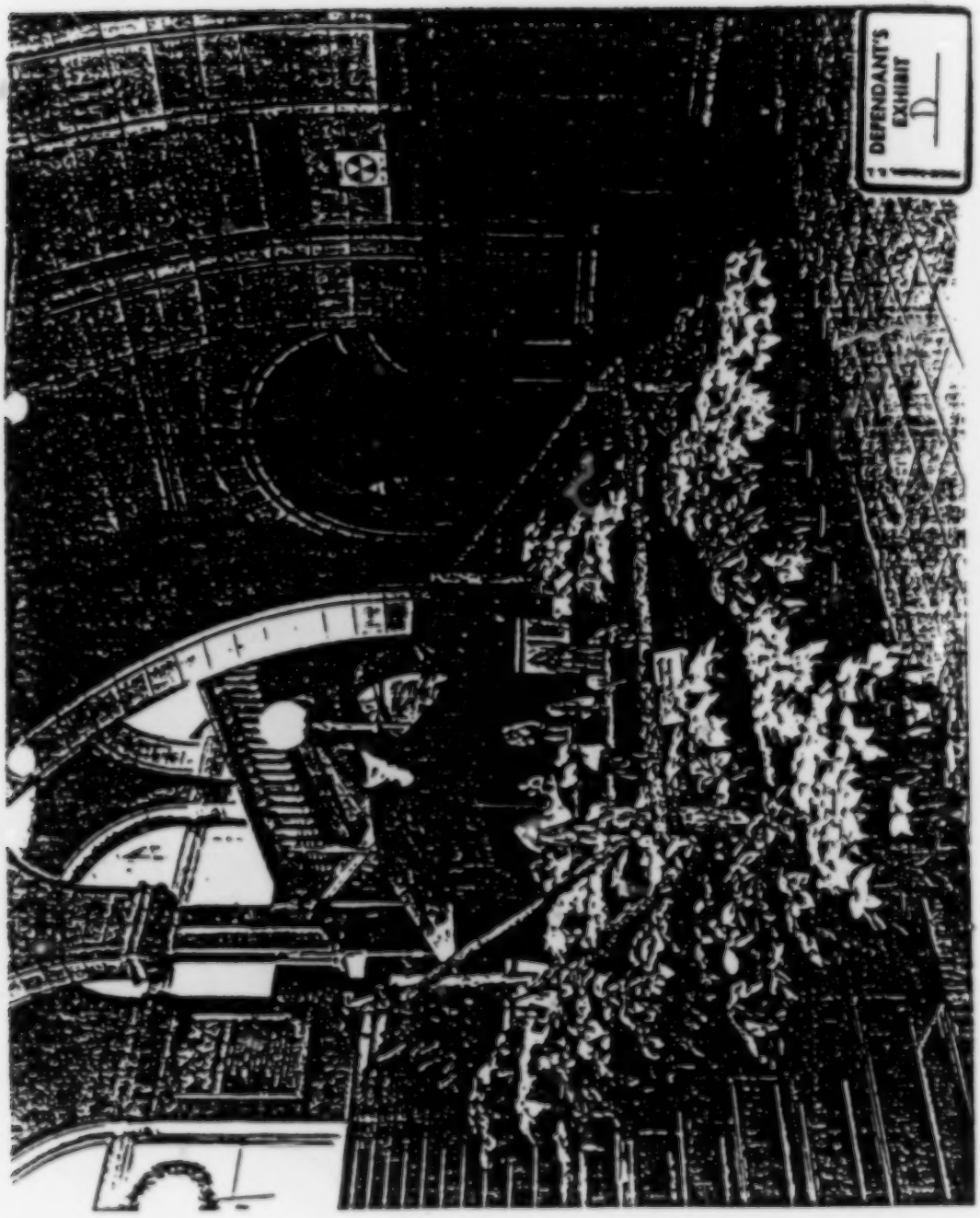
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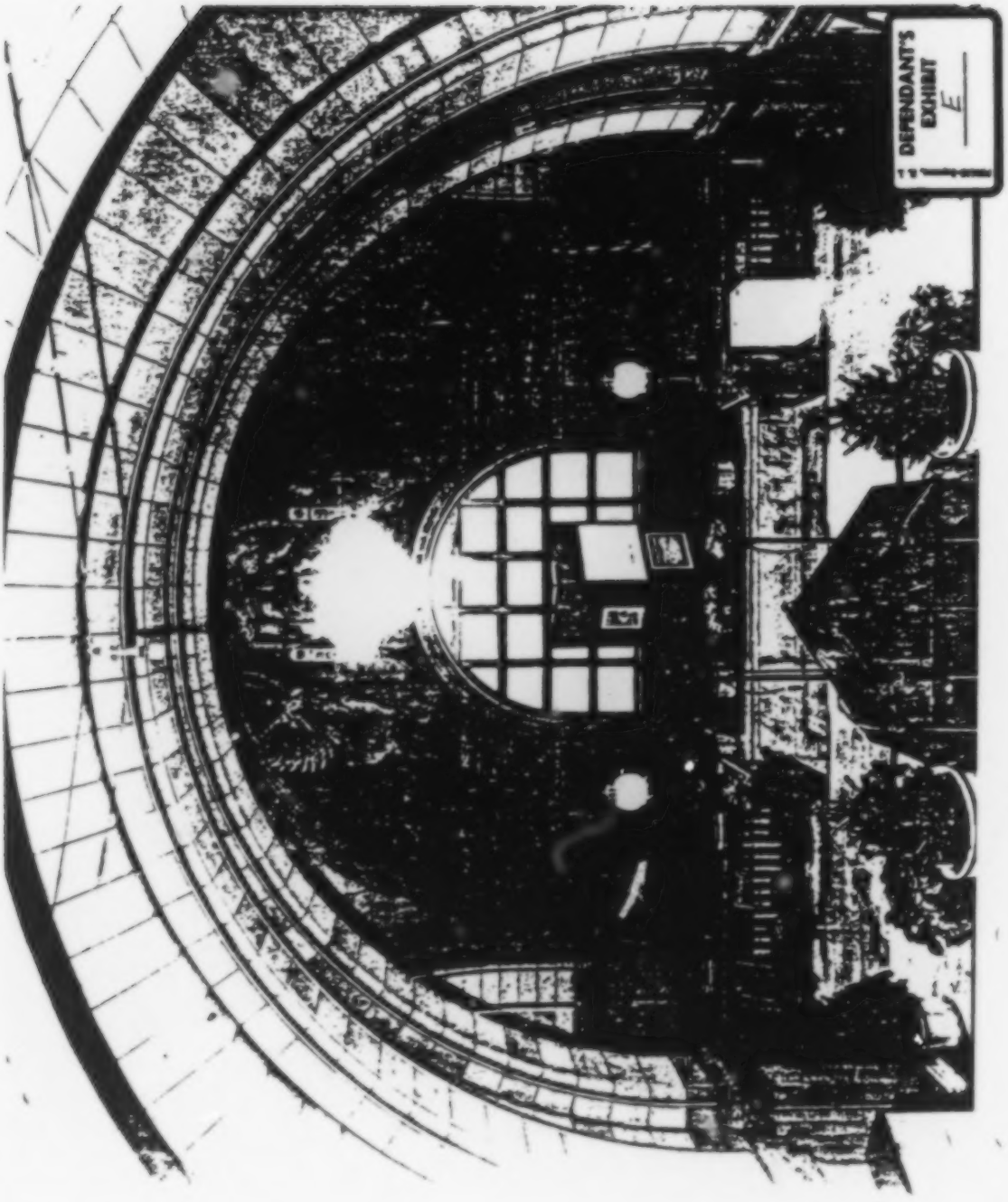
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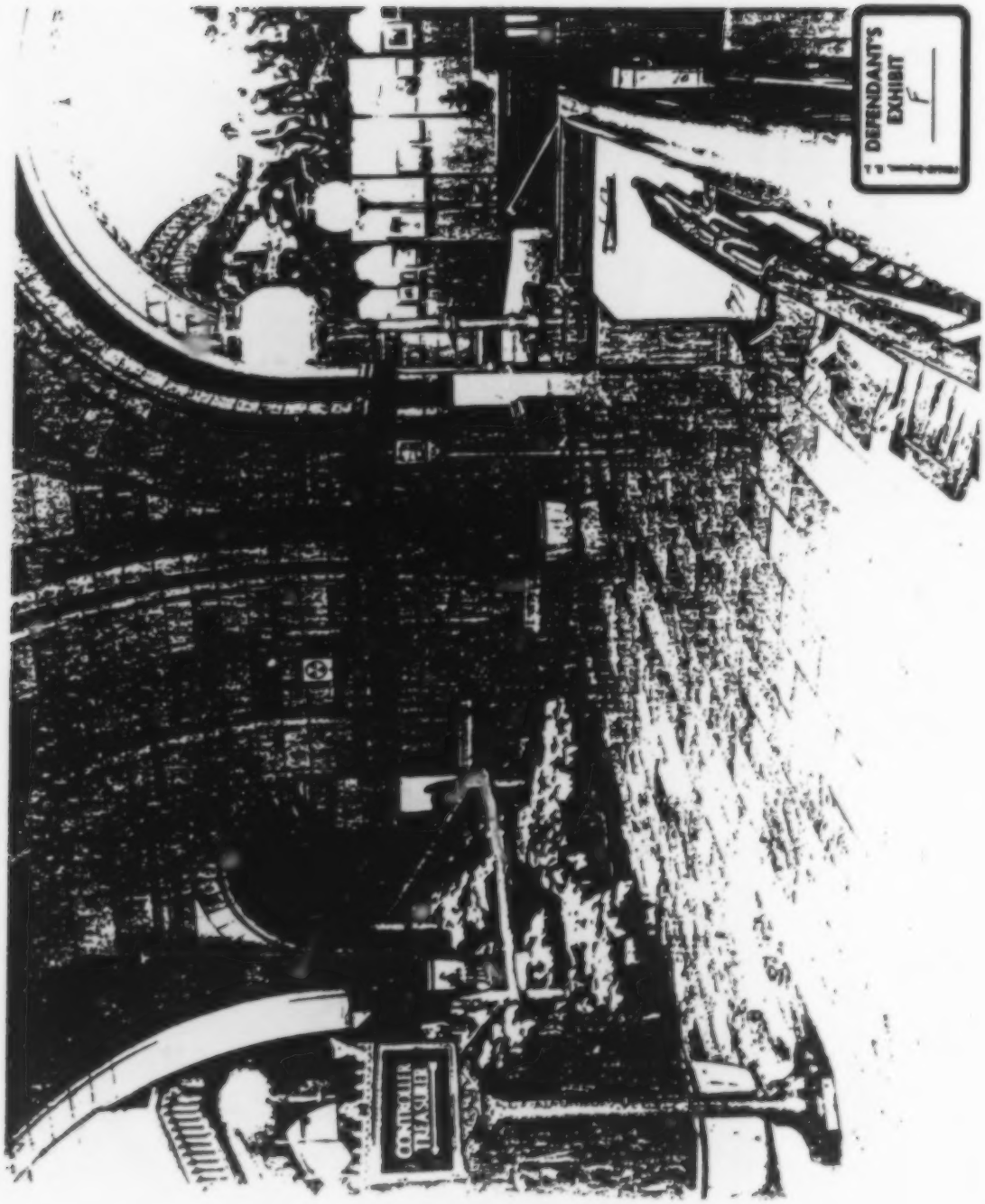
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HAPPY Holidays!
WELCOME TO THE 18th ANNUAL
Christmas Carol
PROGRAM
11:30 AM - 1 PM DAILY
DEC. 4 THRU 20
GRAND STAIRCASE
TOM FOERSTER Chairman · PETE FLAHERTY · BARBARA HAFER
DEFENDANT'S EXHIBIT
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NEWS OF ALLEGHENY COUNTY
COMMUNICATIONS DEPARTMENT • 409A COURTHOUSE • PGH., PA. 15219 • 412-355-5312 • GEORGE N. THOMAS, DIRECTOR
PETE FLAHERTY
TOM FOERSTER, Chairman
BOARD OF COUNTY COMMISSIONERS
BARBARA HAFER

NEWS RELEASE: DEC. 4, 1986 WITH PHOTO: 182072

The 55-member North Allegheny High School Choir, under the direction of Roland Dollhoph, today performed in the 19th Annual County Commissioners' Christmas Carol Program on the Grand Staircase of the County Courthouse.

The choir was one of many high school and other musical groups invited by the commissioners to sing carols at the Courthouse and in the main rotunda of Greater Pittsburgh International Airport, throughout the holiday season.

This year's program is dedicated to world peace and to the families of those Prisoners of War and those Missing-In-Action in Southeast Asia.

At the Courthouse, music is amplified over the carillon speakers in the tower, so that thousands of lunchtime shoppers also can enjoy the free musical entertainment.

The setting for the holiday festivities at the Courthouse is a manger set loaned to the County by the Holy Name Society of the Diocese of Pittsburgh, and fresh greens and poinsettias provided by the Allegheny County Bureau of Cultural Programs.

A delightful exhibit, "From Another Perspective," also is being presented in conjunction with ARC-Allegheny. The display, which features work by artists with Mental Retardation, will be open to the public through Dec. 31.

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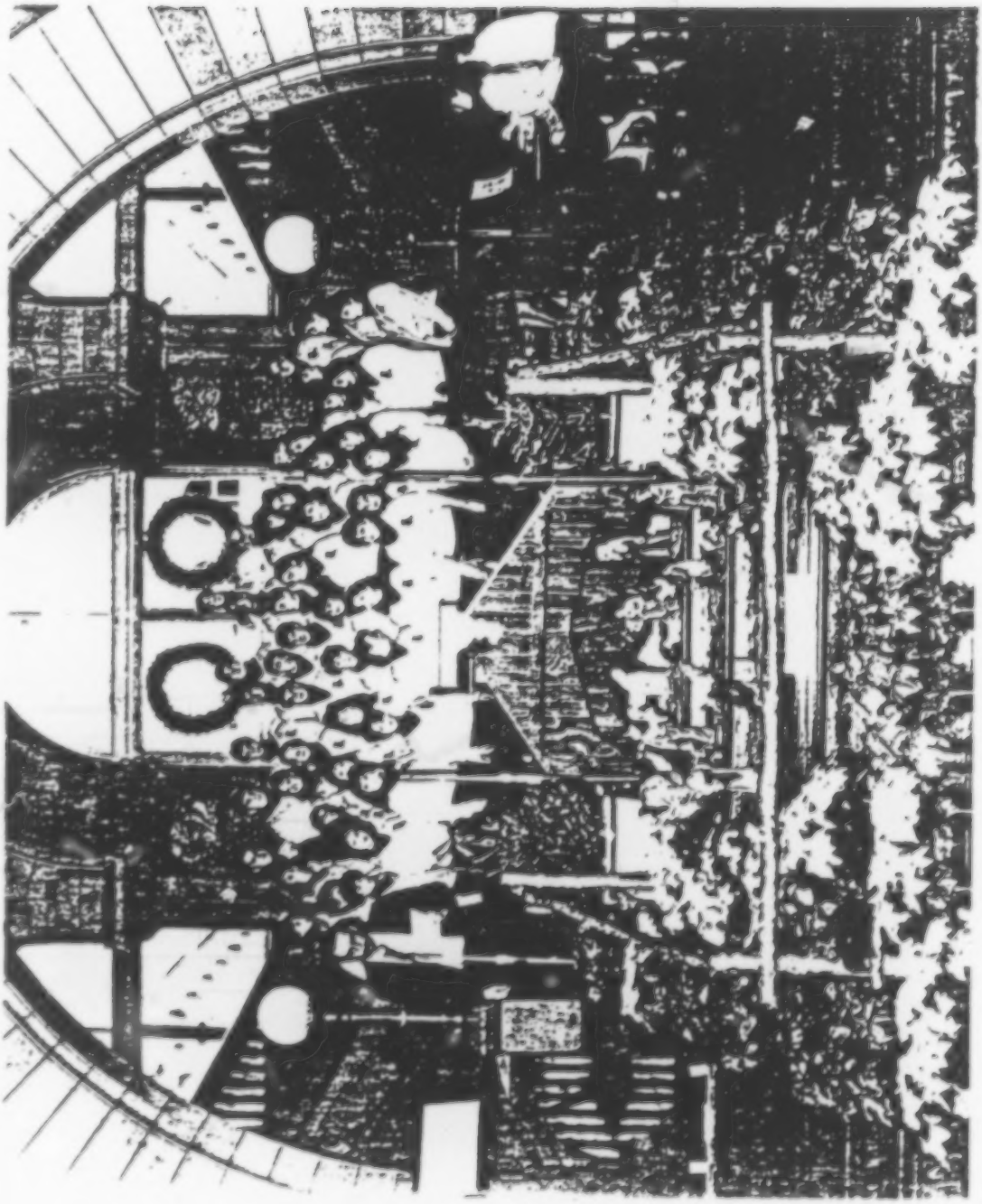

NEWS OF ALLEGHENY COUNTY

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PETE FLAHERTY TOM FOERSTER, Chairman BARBARA HAFER
BOARD OF COUNTY COMMISSIONERS

NEWS RELEASE: DEC. 5, 1986 WITH PHOTO: 182092

The North Allegheny String Ensemble, under the direction of Joe Feich, today performed in the 19th Annual County Commissioners' Christmas Carol Program on the Grand Staircase of the County Courthouse.

The 23-member ensemble was one of many high school and other musical groups invited by the commissioners to perform carols at the Courthouse and in the main rotunda of Greater Pittsburgh International Airport, throughout the holiday season.

This year's program is dedicated to world peace and to the families of those Prisoners of War and those Missing-In-Action in Southeast Asia.

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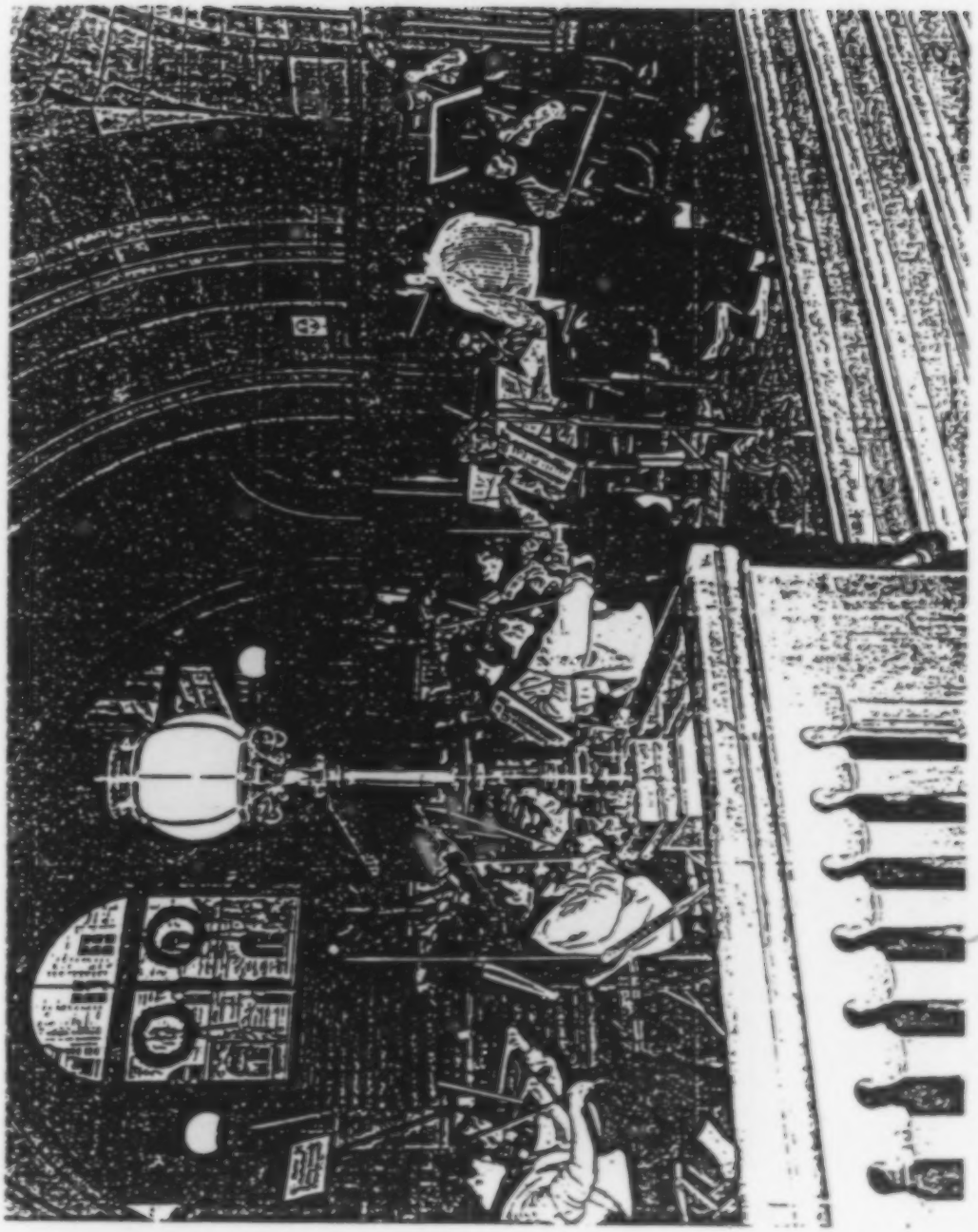
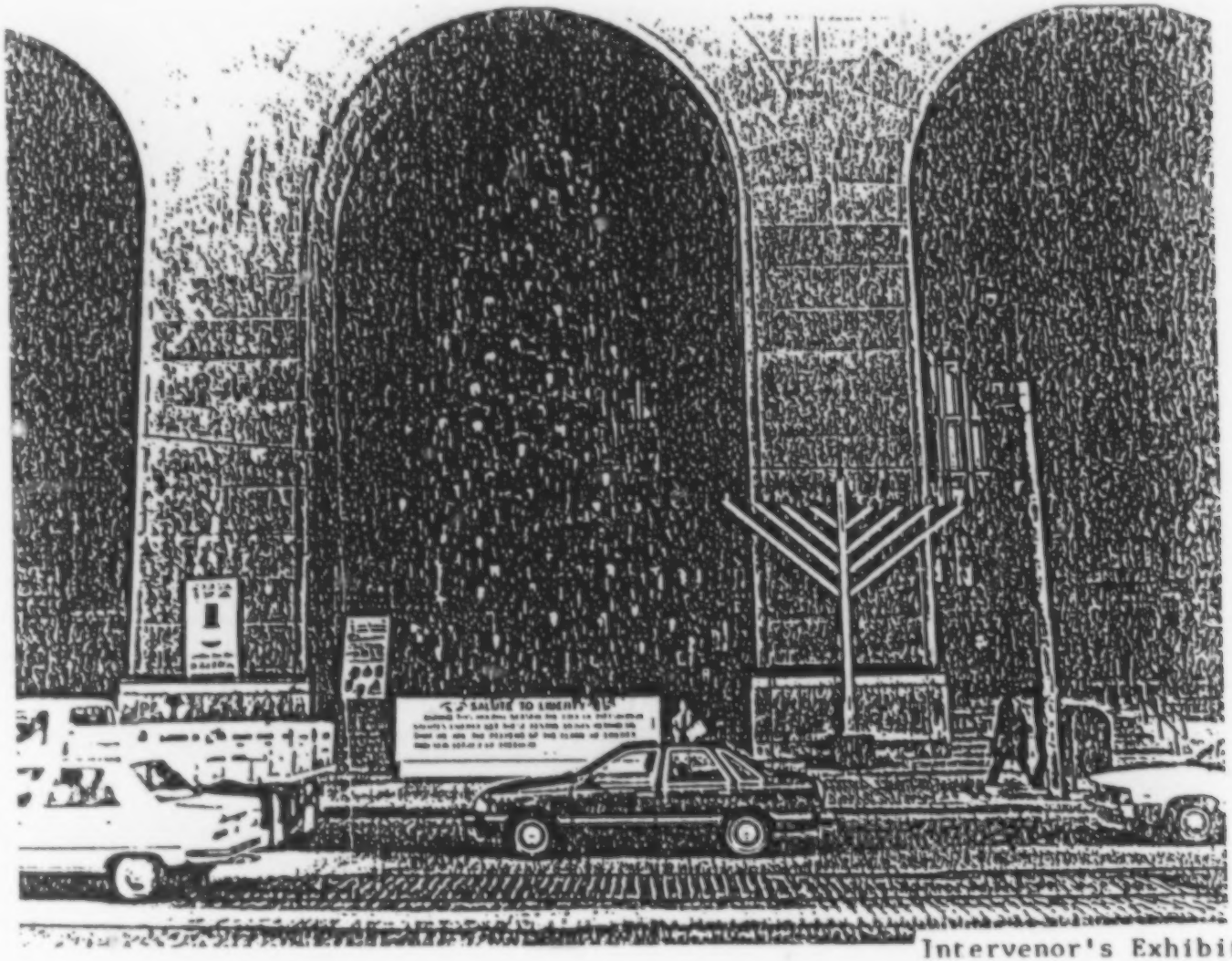
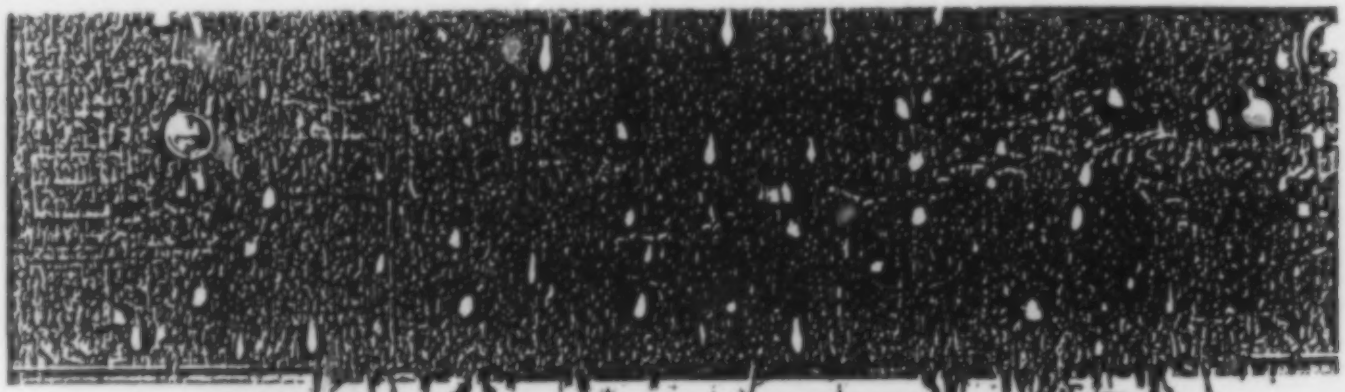




Intervenor's Exhibit 1

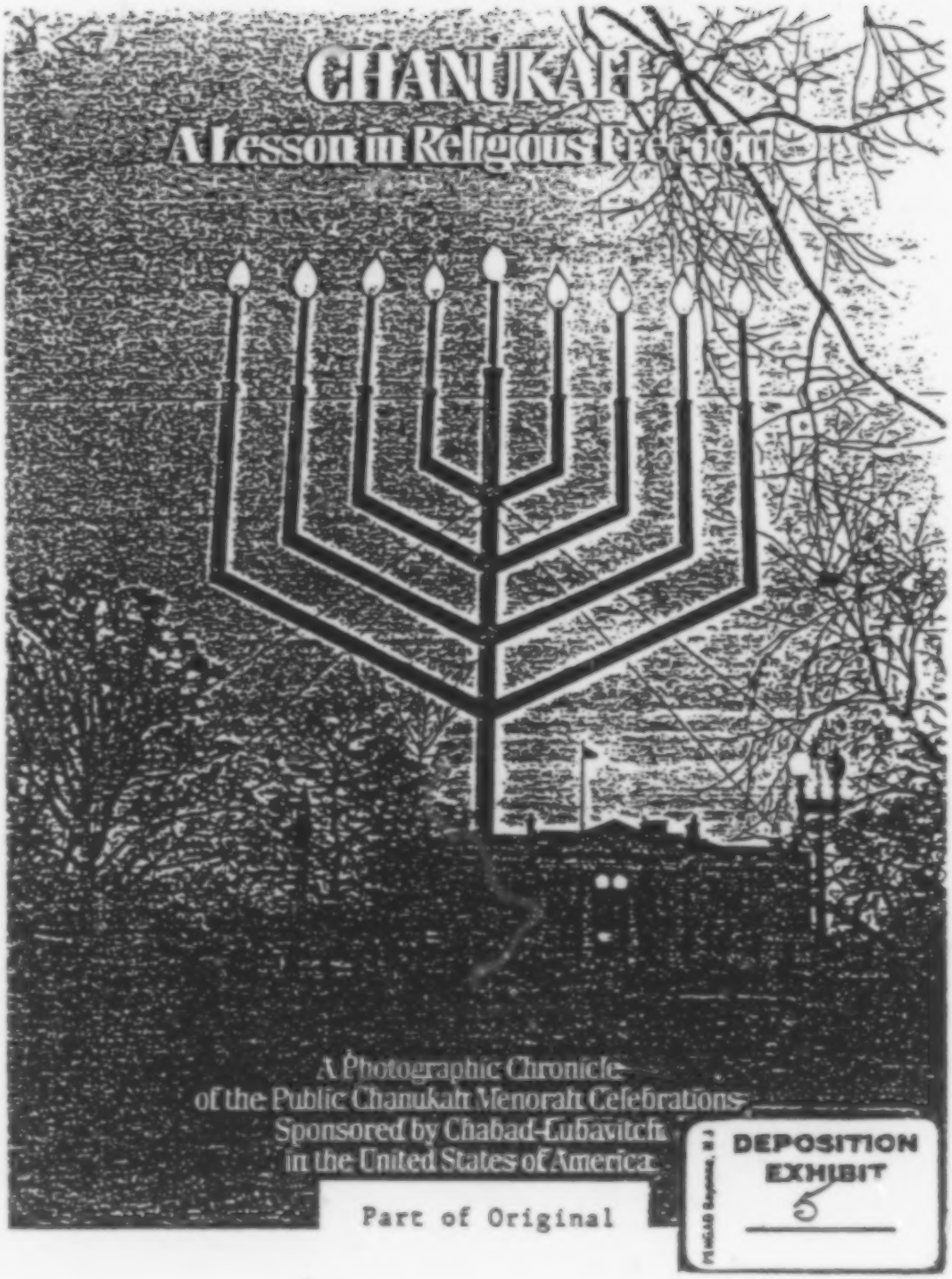


SALUTE TO LIBERTY

DURING THIS HOLIDAY SEASON, THE CITY OF PITTSBURGH SALUTES LIBERTY. LET THESE FESTIVE LIGHTS REMIND US THAT WE ARE THE KEEPERS OF THE FLAME OF LIBERTY AND OUR LEGACY OF FREEDOM.

RICHARD S. CALIGUIRI, MAYOR

Intervenor's Exhibit 2


CHANUKAH
A Lesson in Religious Freedom
A Photographic Chronicle
of the Public Chanukah Menorah Celebrations
Sponsored by Chabad-Lubavitch
in the United States of America
Part of Original
DEPOSITION
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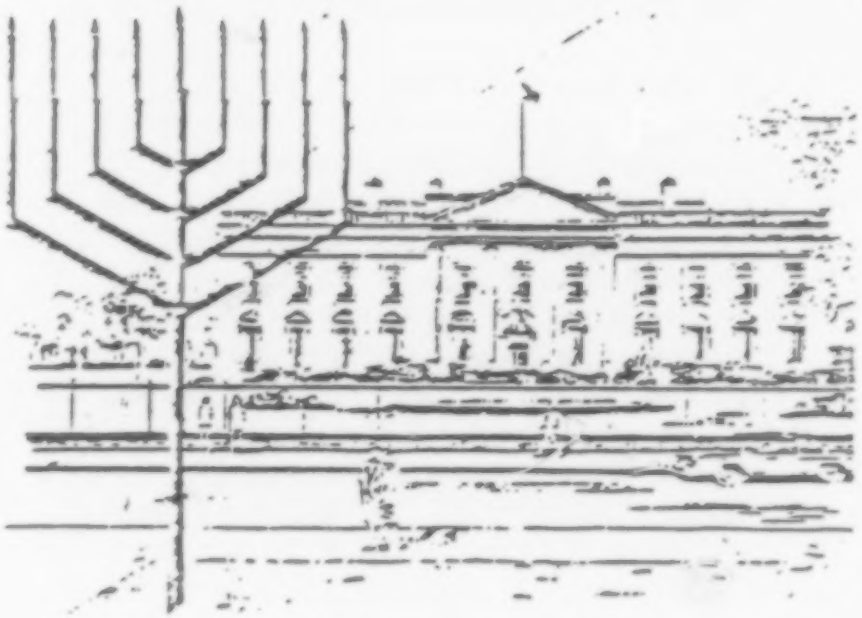
CHANUKAH

A Lesson in Religious Freedom

A Photographic Chronicle of the Public Chanukah Menorah Celebrations Sponsored by Chabad-Lubavitch in the United States of America



Published by

Merkos L'inyonei Chinuch
770 Eastern Parkway
Brooklyn, New York 11213

5746 1985

"...Chanukah, the Festival of Lights, recalls the victory – more than 2100 years ago – of a militarily weak but spiritually strong Jewish people over the mighty forces of a ruthless enemy that had overrun the Holy Land and threatened to engulf the land and its people in darkness.

The miraculous victory–culminating with the rededication of the Sanctuary in Jerusalem and the rekindling of the Menorah which had been desecrated and extinguished by the enemy–has been celebrated annually ever since during these eight days of Chanukah, especially by lighting the Chanukah Menorah, also as a symbol and message of the triumph of freedom over oppression, of spirit over matter, of light over darkness.

It is a timely and reassuring message, for the forces of darkness are ever present. Moreover, the danger does not come exclusively from outside; it often lurks close to home, in the form of insidious erosion of time-honored values and principles that are the foundation of any decent human society. Needless to say, darkness is not chased away by brooms and sticks, but by illumination. Our Sages said, "A little light expels a lot of darkness."

The Chanukah Lights remind us in a most obvious way that illumination begins at home within oneself and one's family, by increasing and intensifying the light of the Torah and Mitzvos in the everyday experience, even as the Chanukah Lights are kindled in growing numbers from day to day. But though it begins at home, it does not stop there. Such is the nature of light that when one kindles a light for one's own benefit, it benefits also all who are in the vicinity. Indeed, the Chanukah Lights are expressly meant to illuminate the "outside," symbolically alluding to the duty to bring light also to those who, for one reason or another, still walk in darkness..."

From a letter by
the Lubavitcher Rebbe
Rabbi Menachem M. Schneerson שליט"א

Chanukah—The First Lesson in Religious Freedom

Standing as the first beacon against the forces of religious bigotry and persecution, the flames of the Chanukah menorah inspire those who cherish freedom of the spirit in a land of precious liberty.

At the outset, every Jew was commanded to mount his menorah on the outside of his home along the public streets to "publicize the miracle" of a small nation's victory over the bloody religious persecution of the ancient Syrian-Greeks. As the light of their freedom dimmed again and Jews were forced to live in lands of bigotry and persecution, the public menorah lights, cowering from the dangers of religious hatred, were forced into the privacy of the home.

Now, in a land that vigorously protects the right of every man to practice his religion free from all forms of restraint and hatred, Jews are lighting the menorah in public places, proclaiming the universal message of religious freedom for all.

Jewish communities in cities across America, from Washington D.C. to San Francisco, are building giant menorot, and kindling freedom's lights in prominent public squares, and in places close to the sources of government which is charged with protecting the rights of its citizenry.

Senator Rudy Boschowitz and Rabbi Moshe Feller.

At the menorah in St. Louis Park, MN. Elie Weisel.

Miracle of the Lights

The land was cleared of all the kings allies and Jerusalem was stormed and liberated. The Maccabee's cleared the Sanctuary of the idols and rebuilt the altar. A central part of the daily service in the Temple was the kindling of the brilliant lights of the menorah each evening. Now, with the Temple about to be rededicated, it was discovered that only one small jug of sacred oil was still pure and sealed. The Maccabees poured the one day supply of oil into the great menorah, lit the flame and in joy and thanksgiving, rededicated the Temple on the 25th day of Kislev, more than 2100 years ago.

The miraculous victory of religious freedom was now compounded by a second great miracle that took place when the small amount of oil did not burn out at the end of the first day, but continued to burn continuously for eight days.

until the special process for preparing new oil could be completed. The next year, the holiday of Chanukah was officially set and celebrated for eight days in perpetual commemoration of this first victory over religious persecution.

Rejoice Today

Today, Jews all over America light their menorot, in thanks to G-d who has saved us "To enjoy these days at this season." Each night an additional light is kindled until, on the eighth day, the menorah is ablaze with eight beautiful lights.

The menorah is to be lit in the evening when the stars first appear. The first day one light is set and kindled and each day another light is added. The newest light, the one furthest to the left, is always kindled first.

"A little light dispels much darkness."—may the light of the Chanukah menorah always illuminate the pathways to serving G-d for all people of good will.

Chanukah 5745-1984

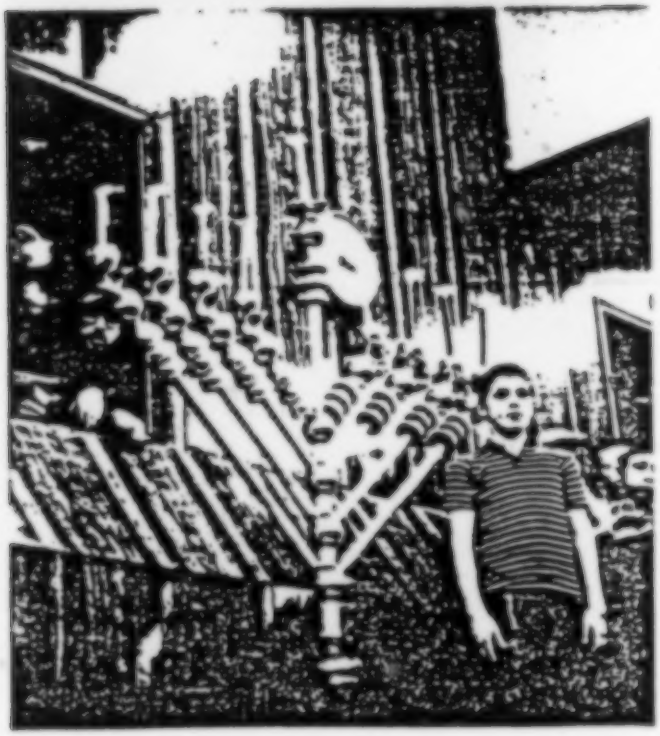
On the eighth day of Chanukah thousands of children gathered in the large synagogue at the Lubavitch World Center, 770 Eastern Parkway, Brooklyn, New York, to *daven Mincha* with the Lubavitcher Rebbe.

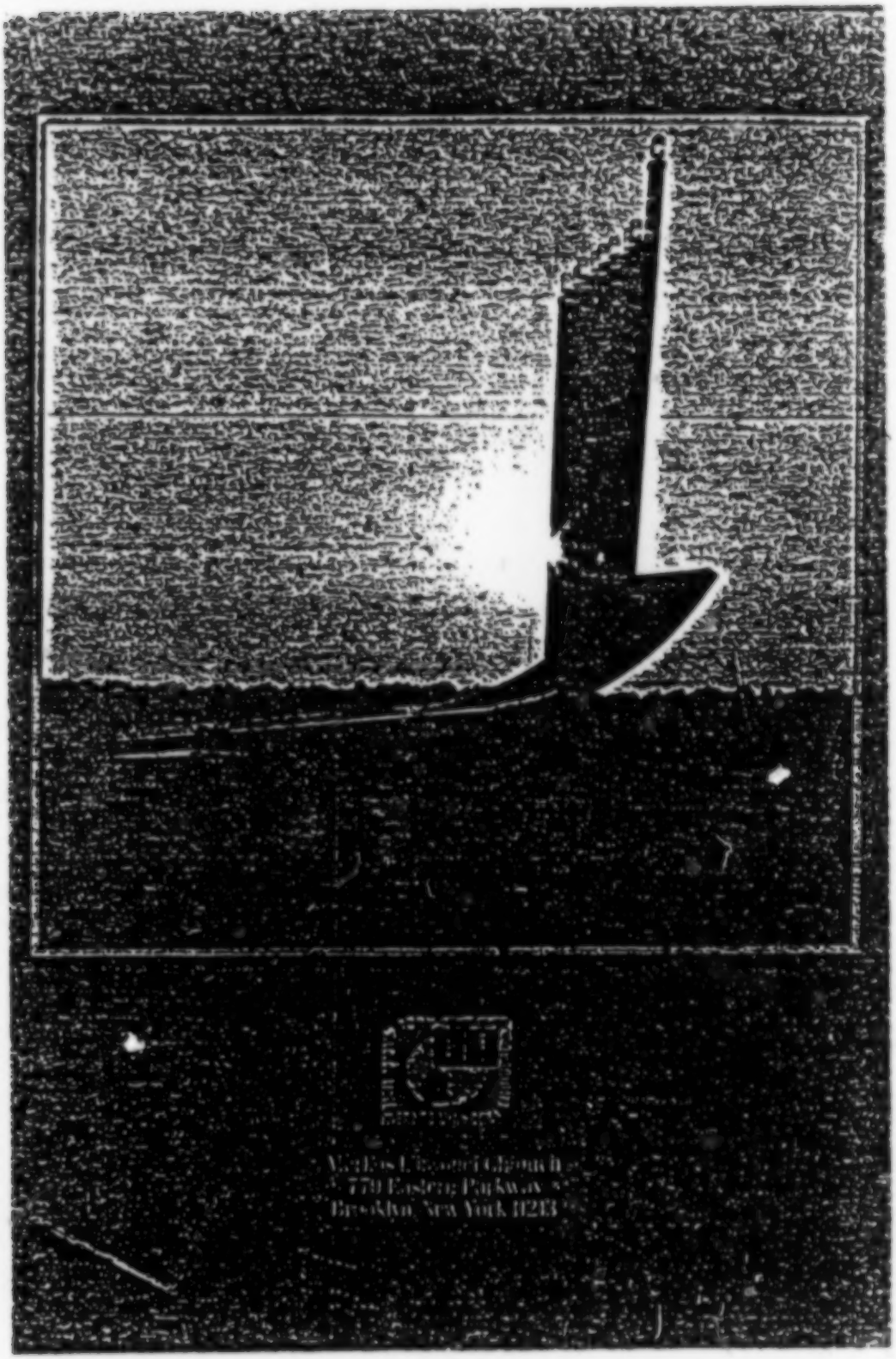
After *Mincha* the Rebbe spoke to the children. The following are excerpts from that talk.

...Chanukah teaches us that our mission is to illuminate the darkness of the world with the brilliant light of Torah and Mitzvot.

...We can not be satisfied with the amount of light added today; we must add additional light every day.

...The lessons of Chanukah should influence every day of the year.





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Nos. 87-2050, 88-90, 88-96

In the Supreme Court of the United States

October Term, 1988

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania, the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania, and CHABAD,

Petitioners,

vs.

AMERICAN CIVIL LIBERTIES UNION GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HOWARD ELBLING, HILARY SPATZ LEVINE, MAX A. LEVINE and MALIK TUNADOR,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Brief of Petitioner, County of Allegheny

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QUESTION PRESENTED

Whether the County of Allegheny's display of a privately owned nativity scene inside the Allegheny County Courthouse as part of an annual seasonal celebration of the Christmas holiday violates the Establishment Clause of the First Amendment of the United States Constitution.

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In the Supreme Court of the United States

October Term, 1988

Nos. 87-2050, 88-90 and 88-96

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania, the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania, and CHABAD,
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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE PETITIONER COUNTY OF ALLEGHENY

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 842 F.2d 655 and appears at pp. 7a to 43a in the Petition for a Writ of Certiorari. The memorandum opinion of the United States District Court for the Western District of Pennsylvania is not officially reported and appears at pp. 1a to 5a in the Petition for a Writ of Certiorari.

JURISDICTION

The judgment of the panel of the Third Circuit Court of Appeals was entered on March 15, 1988. The Order of the Third Circuit denying the Court of Allegheny's petition for rehearing before the Court in banc was entered on April 19, 1988. The Petition of the County of Allegheny for a Writ of Certiorari was filed on June 14, 1988 and the Writ was issued on October 3, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The provision of the United States Constitution involved in this case is the Establishment Clause of the First Amendment as made applicable to the States through the Fourteenth Amendment. The Establishment Clause of the First Amendment states:

> "Congress shall make no law respecting an establishment of religion . . . ."

STATEMENT OF THE CASE

Since 1968, Allegheny County has invited various choirs to participate in a Christmas carol program. (J.A. 157). The performances for the program are scheduled during the weeks preceding the Christmas holiday and are

held in two locations: the rotunda of Greater Pittsburgh International Airport and the first floor of the County Courthouse (J.A. 157-58) in an architecturally impressive area known variously as the Grand Staircase (J.A. 157) and the Courthouse Gallery/Forum. (J.A. 163). Each performance consists of various choirs, typically high school students (J.A. 158), singing both popular songs as well as religious and secular Christmas carols. (J.A. 169). The program is annually dedicated to the universal themes of world peace and brotherhood and to the memory of the missing in action of the Vietnam War. (J.A. 160, 175). The carol program is publicized by a large banner hung outside the County Courthouse (J.A. 167; Def. Ex. H; R. 126, 128) and by press releases. (J.A. 159). At the Courthouse, the caroling is broadcast by loudspeakers to the public at large. (J.A. 167).

On the steps of the Grand Staircase where the choirs perform is erected a nativity scene or creche. (J.A. 161; Def. Ex. I; R. 126, 129). The creche consists of the traditional figures—a wooden stable with the infant Jesus, the Virgin Mary, Joseph, the Three Wise Men, the Shepherds, various animals and an angel holding a banner reading "Gloria in Excelsis Deo". (J.A. 164). The figurines range in height from three to fifteen inches. (J.A. 164). The nativity scene is enclosed by a fence and takes up a small area on the Grant Staircase. (J.A. 186).

The entire area of the Courthouse where the Christmas carol program is held and the nativity scene is displayed is decorated in traditional Christmas fashion—red and white poinsetta plants, evergreen trees with red bows and Christmas wreaths. (J.A. 161). These decorations are purchased and arranged by the County's Bureau of Cultural Programs. (J.A. 199). Other decorations, including

wreaths, trees and Santa Clauses, are displayed by various departments and offices throughout the Courthouse building. (J.A. 167).

Although a nativity scene has been displayed in conjunction with the choral program since the program's inception, (J.A. 157, 161, 189) the particular nativity scene displayed on the steps of the County Courthouse at the time in question has only been used as part of the choral program since 1981. (J.A. 164). This nativity scene is not owned by the County; rather, it is the property of the Holy Name Society of the Diocese of Pittsburgh, a Catholic mens' organization. (J.A. 164). Ownership of the creche is noted by a sign in front of the nativity scene which reads "This display donated by the Holy Name Society." (J.A. 164).

Other than providing storage space in the basement of the Courthouse for the past two years (J.A. 165) and a dolly to transport the display to and from its place of storage (J.A. 165), the County has no other involvement with the nativity scene. The County provides no special security, lighting or maintenance for the display. (J.A. 165). Moreover, the creche is erected, arranged and disassembled each year by the moderator of the Holy Name Society without the assistance of County personnel. (J.A. 165).

In addition to serving as one of the locales for the annual Christmas carol program, the Grand Staircase—Gallery/Forum Area of the County Courthouse is used throughout the year for art displays (J.A. 163, 167) and other civic and cultural events and programs. (J.A. 176).

In November, 1986, the American Civil Liberties Union (ACLU) sent a letter to the County's Board of Commissioners requesting removal of the nativity scene. (J.A. 90-91). In a written response to this letter, the County Commissioners disavowed any intent to endorse any particular religion through the display. The Commissioners wrote that the purpose of the display of the nativity scene, along with other holiday symbols, was simply to express the wish of "Good Will to All Men". (Def. Ex. A; R. 51, 52).

On December 10, 1986, the ACLU and several individuals filed a complaint pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343(3) in the United States District Court for the Western District of Pennsylvania seeking to enjoin the County of Allegheny from displaying a nativity scene inside the Courthouse and the City of Pittsburgh from displaying a Chanukah menorah outside the City-County Building. After denying an application for a temporary restraining order, the Honorable Barron P. McCune scheduled a hearing on a motion for a preliminary injunction for December 15, 1986. At the conclusion of the hearing, the District Court denied the motion for a preliminary injunction.

In his brief oral opinion, Judge McCune indicated that the case was controlled by *Lynch v. Donnelly*, 465 U.S. 668 (1984). (J.A. 8). Judge McCune found that the display of the creche and the menorah conveyed no message of government endorsement and were *de minimus* in the context of the application of the Establishment Clause. (J.A. 9, 10).

Subsequent to the hearing on the motion for a preliminary injunction, Chabad, a Jewish group which owns the menorah and which attempted to intervene in the case during the preliminary injunction hearing, filed a formal

motion to intervene. The District Court granted Chabad's motion to intervene and a second hearing was held on April 24, 1987 for the limited purpose of permitting Chabad to present evidence concerning the menorah. (J.A. 61).

By opinion and order dated May 8, 1987, Judge McCune denied the ACLU's motion for a permanent injunction and declaratory relief. On May 29, 1987, judgment in the case was formally entered in favor of the County and the City, and an appeal followed. (J.A. 11).

In a decision dated March 15, 1988, the Third Circuit Court of Appeals reversed the judgment of the District Court. By a vote of two-to-one, the Court of Appeals held that the display of a nativity scene inside the County Courthouse had the effect of endorsing religion and thus violated the second prong of the three-part establishment test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

In reversing the District Court's decision, the Third Circuit's panel majority relied upon no specific factor in declaring the display inside the Allegheny County Courthouse unconstitutional. Instead, the majority listed six so-called objective "variables" that a court should consider in determining whether the use of a religious symbol in a display on public property or by a public entity has the effect of advancing or endorsing religion. These factors are: (1) the location of the display; (2) whether the display is part of a larger configuration including nonreligious items; (3) the religious intensity of the display; (4) whether the display is shown in connection with a general secular holiday; (5) the degree of public participation in the ownership and maintenance of the display; and (6) the existence of disclaimers of public sponsorship of the display. (Cert. Pet. 22a).

The dissenting opinion in the Court of Appeals agreed with the District Court that the *Lynch* decision "directly addresses and conclusively resolves the dispute we encounter here." (Cert. Pet. 33a). The dissent declared that "irrelevant and inconsequential variations" in the location and arrangement of a display did not "justify disregarding the clear spirit of *Lynch*." (Cert. Pet. 35a-36a). The dissent concluded that the panel majority's decision strayed from the *Lynch* decision's course of "moderation, understanding, and a sense of proportion in ruling on displays commemorating the Christmas season." (Cert. Pet. 40a).

On April 19, 1988, the Circuit Court denied the County's petition for rehearing before the Court in banc. Five judges of the Court voted in favor of granting rehearing by the Court in banc and the panel's dissenting judge voted in favor of panel rehearing. (Cert. Pet. 45a).

On October 3, 1988, this Court granted the County's petition for certiorari.

SUMMARY OF THE ARGUMENT

In *Lynch v. Donnelly*, this Court held that the display of a nativity scene by a municipality does not violate the Establishment Clause of the United States Constitution. In deciding *Lynch*, the unmistakable thrust of this Court was not merely to determine the constitutionality of one particular display in one city during one Christmas season but to establish broad principles generally recognizing that the long practice of displaying nativity scenes during the Christmas holiday under municipal auspices constitutes neither an impermissible endorsement of religion nor a real threat to the aims of the Establishment Clause. That this Court intended its decision in *Lynch* to have application beyond its particular facts is evidenced by its choice of the context of the season, a standard applicable to all holiday displays, as the analytical framework for examining the constitutionality of municipal nativity displays.

Despite the seeming clarity of *Lynch*, several divided circuit courts of appeal have held that *Lynch* is limited to its particular facts. The attempts in these cases to distinguish Lynch based on a Christmas display's physical context—i.e.—its arrangement or location, are expressly contrary to the teachings of *Lynch* and should be rejected.

An attempt to distinguish *Lynch* based upon the content or arrangement of a municipal nativity scene has no basis of support in *Lynch*. In that case, this Court never viewed the specific secular decorations in the City of Pawtucket's display as having any crucial bearing on the constitutional question before it. More importantly, a physical content distinction of *Lynch* is unsound because it makes trifling details of Christmas minutia matters of constitutional significance. This physical content distinction inevitably trivializes the constitutional principles set forth in

Lynch and leads to endless litigation over the constitutionality of every municipal Christmas display.

An attempt to distinguish *Lynch* based upon the location of a municipal nativity scene on public property is as unpersuasive as the distinction based upon content and arrangement. Focusing upon public property and using it as an automatic invalidation device would require this Court to give special significance to a factor treated as essentially irrelevant in prior cases. Additionally, the physical location distinction greatly exaggerates the threat to religious liberty conveyed by a passive symbol. Finally, the physical location distinction would impose an absolutist view of the Establishment Clause, a position this Court has consistently rejected.

Even if the constitutionality of a holiday display turns on its particular content and location, the County Courthouse display would still pass constitutional muster under either the *Lemon* test, as applied in *Lynch,* or the endorsement test proposed by Justice O'Connor. Like the display in *Lynch,* the Courthouse display has a secular purpose, confers only indirect, remote and incidental benefits on religion and presents little danger of excessive administrative entanglements. Examining the history, language and administration of the County Courthouse display, an objective observer would conclude that the County's seasonal display was a celebration of the Christmas holiday and not an endorsement of religion.

ARGUMENT

I. THIS COURT'S HOLDING IN *LYNCH V. DONNELLY* IS DISPOSITIVE OF THE ISSUE OF WHETHER A MUNICIPAL DISPLAY OF A NATIVITY SCENE IS CONSTITUTIONAL.

In determining whether the placement of a nativity scene inside the Allegheny County Courthouse was constitutional, the Third Circuit panel's majority opinion referred to this Court's decision in *Lynch v. Donnelly*, 465 U.S. 668 (1984) as "the starting point" of its analysis. *American Civil Liberties Union v. County of Allegheny*, 842 F.2d 655, 659 (3rd Cir. 1988). But after reviewing *Lynch* and labeling it as "a decision of great significance," *id.* at 660, the panel majority—without any explanation or comment—simply failed to follow it. Instead, the panel majority proceeded to analyze the nativity scene displayed in the County Courthouse under the familiar establishment test of *Lemon v. Kurtzman*. The Third Circuit's resort to the *Lemon* test for a reexamination of the question of the constitutionality of municipal nativity displays was clearly erroneous because that question was definitively answered by *Lynch*.

In *Lynch*, this Court held that the City of Pawtucket's inclusion of a nativity scene in a seasonal holiday display did not violate the Establishment Clause. In upholding the constitutionality of the City's display of the nativity scene, this Court in *Lynch* utilized the three-pronged test articulated in *Lemon*.

Addressing initially the issue whether the Pawtucket nativity scene had a secular purpose, Chief Justice Burger, writing for the majority, declared that the district court

had erred by focusing exclusively on the religious nature of the creche. The Chief Justice stated that the focus of the *Lemon* inquiry must instead be on the creche in the context of the Christmas season. *Lynch*, 465 U.S. at 679. Viewed in this perspective, the Court declared that the secular purpose prong of the *Lemon* test was satisfied because the nativity scene display was sponsored by the City to celebrate the Holiday and to depict the historical origins of an event long recognized as a national holiday. *Id.* at 681.

Chief Justice Burger next stated that the nativity scene in *Lynch* did not have a primary effect of advancing religion. In making this determination, the Court stated that inclusion of the nativity scene conferred no greater benefit to religion that those practices found constitutional in other cases. *Id* at 681. While conceding that the display of a nativity scene would advance religion "in a sense", *id.* at 683, the Court nevertheless found such aid or benefit to be "indirect, remote and incidental." *Id.*

Finally, this Court found that the nativity scene in *Lynch* did not create an excessive entanglement between government and religion. The majority in *Lynch* noted the absence of any excessive administrative entanglements between the government and religion surrounding the erection of the City's nativity scene. The Court added that in the absence of such administrative entanglement, claims of political divisiveness alone were insufficient to invalidate otherwise permissible government conduct. *Id.* at 684.

In conclusion, Chief Justice Burger emphasized that banning the creche from the municipal display in question "would be a stilted overreaction." *Id.* at 686. The Chief Justice labeled the notion that a municipal display of a

nativity scene posed a real danger of establishment of a state church as "far-fetched indeed," *Id.*

Although joining in the opinion of the Court in *Lynch*, Justice O'Connor wrote a concurring opinion suggesting a clarification of Establishment Clause doctrine based upon the notion of governmental endorsement or disapproval of religion. *Id.* at 688.

Justice O'Connor initially stated that the purpose of including the nativity scene in the Pawtucket display was the "celebration of the public holiday through its traditional symbols." *Id.* at 691. (O'Connor, J., concurring). Justice O'Connor concluded: "Celebration of public holidays, which have cultural significance even if they also have religious aspects, is a legitimate secular purpose." *Id.*

Justice O'Connor further declared that the display of a creche does not actually communicate a message of government endorsement of Christianity. While noting "the religious and indeed sectarian significance of the creche," Justice O'Connor found that "the overall holiday setting . . . negates any message of endorsement of that content." *Id.* at 692 (O'Connor, J., concurring).

Given this Court's statements in *Lynch*, the Third Circuit's description of that decision as "the starting point" for resolving this case is only partially correct; *Lynch* is not only the starting point but the ending point as well because the clear teachings of *Lynch* extend well beyond one particular display in one particular city during one Christmas season.

The true significance of *Lynch* clearly lies not in its particular facts but in its formulation of broad principles generally applicable to the erection of Christmas-time displays of nativity scenes under municipal auspicies. These

broad principles state the long practice of displaying nativity scenes during the holiday season under municipal auspices constitutes neither an impermissible endorsement of religion nor a real threat to the aims of the Establishment Clause. Put in more practical terms, *Lynch* holds that a municipality may display all of the symbols of Christmas without endorsing Christianity. *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 131 (7th Cir. 1987) (Easterbrook, J., dissenting).

Because it failed to follow the clear teachings and spirit of *Lynch v. Donnelly*, the controlling precedent in this case, the Third Circuit's reexamination of the constitutionality of the holiday display in the County Courthouse was clearly erroneous and, therefore, should be reversed.

II. THE HOLDING IN *LYNCH* CANNOT BE DISTINGUISHED ON THE BASIS OF A DIFFERENT PHYSICAL CONTEXT

Despite the seeming clarity of this Court's holding in *Lynch* that a municipal nativity scene erected during the holiday season does not constitute any real danger of an establishment of religion, several divided courts of appeal have given that decision a very narrow reading. These courts have seized upon Chief Justice Burger's detailed description of the City of Pawtucket's display[1] in order to justify distinguishing *Lynch* on its facts, reapplying the *Lemon* test and finding a nativity display in a different physical context violative of the Establishment Clause. The cases which have distinguished *Lynch* have generally been of two types.

The first type, exemplified by the cases of *American Civil Liberties Union v. City of Birmingham*, 791 F.2d 1561 (6th Cir.), *cert. denied* 107 S.Ct. 421 (1986), and *Burelle v. City of Nashua*, 599 F.Supp. 792 (D.N.H. 1984), holds that the constitutionality of a municipal holiday display is dependent upon the content of the display—i.e., its actual physical arrangement. Therefore, "an unadorned creche"—a nativity scene without the secular Christmas figurines present in *Lynch* such as reindeer and Santa Claus—is unconstitutional.

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[1]Chief Justice Burger noted that the display included, among other things, "a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant and a teddy bear, hundreds of colored lights, [and] a large banner that read "Seasons Greetings." 465 U.S. at 671. The size, cost and expenses related to the creche were also noted. *Id.*

The second, exemplified by the case of *American Jewish Congress v. City of Chicago*, 827 F.2d 120 (7th Cir. 1987), holds that the constitutionality of a municipal holiday display is dependent upon the location of the display. Therefore, a display of a creche on public property as opposed to one in a private park as in *Lynch*, even if accompanied by secular Christmas symbols, is unconstitutional. The court in *Chicago* reasoned that the mere presence of such a religious symbol on public property automatically creates the implication of government approval and unavoidably fosters an inappropriate identification with religion.

Such attempts to limit *Lynch* based upon the physical context of a municipality's display of a nativity scene are wholly without merit.

A. THIS COURT'S DECISION IN *LYNCH* WAS NOT BASED ON THE CONTENTS OR LOCATION OF A HOLIDAY DISPLAY

In deciding *Lynch v. Donnelly*, the unmistakable thrust of this Court was not merely to examine whether one particular holiday display in one city during one Christmas season was unconstitutional. Rather, this Court utilized *Lynch* to formulate a broad rule of constitutional law generally applicable to the display of nativity scenes under municipal auspices. That this Court intended its decision in *Lynch* to have application beyond its particular facts is evidenced by its choice of a broad standard—the context of the season—as the proper analytical framework for examining the constitutionality of municipal nativity scenes.

Throughout the majority opinion, Chief Justice Burger consistently referred to "the creche in the context of the Christmas season." *Lynch*, 465 U.S. at 679, 680. The former Chief Justice further stated:

> To forbid the use of this one passive symbol—the creche—*at the very time people are taking note of the season* with Christmas hymns and carols in public schools and other public places, and while the Congress and Legislatures open sessions with prayers by paid chaplains would be a stilted overreaction contrary to our history and our holdings.

Id. at 686 (emphasis added).

Justice O'Connor also took notice of the importance of the "context of the season" in her concurring opinion. Justice O'Connor declared:

> Although the religious and indeed sectarian significance of the creche, as the district court found, is not neutralized by the setting, *the overall holiday setting* changes what viewers may fairly understand to be the purpose of the display—as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that context.

Id. at 692 (emphasis added)

The significance of the context of the season was duly noted by the Second Circuit in the case of *McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984), *aff'd by an equally divided court sub nom. Board of Trustees of Village of Scarsdale v. McCreary*, 471 U.S. 83 (1985). In the only

unanimous post-*Lynch* appellate decision,[2] the appeals court labeled as "erroneous", *id.* at 729, the argument that *Lynch* could be distinguished based upon the particular physical context of a municipality's display of a nativity scene. The Court in *McCreary* declared: "The Supreme Court did not decide the Pawtucket case based upon the physical context within which the display of the creche was situated." *Id.*

In short, by adopting a seasonal context, a standard applicable to all holiday displays, this Court clearly signaled that, notwithstanding its religious element, the display of a nativity scene under municipal auspices passed Establishment Clause scrutiny. Given the choice of this analytical framework, any attempt to graft a physical context limitation onto *Lynch* should be rejected.

B. DISTINGUISHING *LYNCH* BASED ON THE CONTENT OF A MUNICIPAL CHRISTMAS DISPLAY IS ARTIFICIAL AND FRIVOLOUS.

As noted previously, several courts have held that this Court's decision in *Lynch v. Donnelly* is limited to its particular facts. Thus, a different result can be reached if

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[2]The recently decided district court case of *Doe v. City of Warren*, No. 87-30084 (E.D. Mich. Oct. 20, 1988) also recognized the significance of the context of the season in determining the constitutionality of holiday displays. In *City of Warren*, the district court held that a display of a variety of symbols of the Christmas holiday season, both secular and religious, on the front lawn of the Warren City Hall did not violate the Establishment Clause. The Court in *City of Warren* notes: "The circumstances of apparent importance in *Lynch* included the 'context of the season,' a factor virtually overlooked in the opinions previously discussed." *Doe v. City of Warren*, No. 87-30084, slip op. at 5 (E.D. Mich. Oct. 20, 1988). The memorandum opinion in *City of Warren* is attached hereto as Appendix A to this Brief.

the physical context of a municipal Christmas display is different from the one in *Lynch*. One line of cases in particular holds that the constitutionality of a municipal Christmas display is dependent upon its content—i.e.—its actual physical arrangement. *American Civil Liberties Union v. City of Birmingham*, 791 F.2d 1561 (6th Cir. 1986); *Burelle v. City of Nashua*, 599 F.Supp. 792 (D.N.H. 1984). Therefore, "an unadorned creche"—a nativity scene without the specific secular Christmas figurines noted in *Lynch*—is unconstitutional. A physical content distinction is not only unsupported by *Lynch* but also is an artificial distinction inviting frivolous litigation and inevitably trivializing constitutional adjudication.

In *Lynch*, this Court never viewed the specific secular decorations in the City of Pawtucket's display as having any crucial bearing on the resolution of the constitutional question before it. Other than in his initial description of the Pawtucket display, Chief Justice Burger never mentioned the secular Christmas decorations in the Court's opinion, let alone attributed any special significance to their presence. Moreover, both Chief Justice Burger and Justice O'Connor noted that the secular decorations did not drain or nullify the religious and sectarian significance of the creche. *Lynch*, 465 U.S. at 685, 692. Thus, the *Lynch* decision itself provides no support for distinguishing municipal holiday displays based upon Christmas minutia.

More importantly, a physical content distinction of *Lynch* is fundamentally unsound because it artificially elevates trifling details about the particulars of a municipal display into matters of high and vital constitutional importance. The dissent in *American Civil Liberties Union v. City of Birmingham* aptly describes this fastidious concern

over the particulars of the arrangement of a municipal holiday display as the "St. Nicholas too" test:

> The lesson comes down to this: a city is free to display such a scene at Christmas if it is balanced by symbols which, although they may also be associated with Christmas, are considered secular in origin. If enough such symbols are displayed, the manger scene will pass constitutional muster. It may be convenient to think of this as a "St. Nicholas too" test—a city can get by with displaying a creche if it throws in a sleigh full of toys and a Santa Claus, too.

791 F.2d at 1569.

The dissent in *City of Birmingham* cogently observed the ridiculous and frivolous nature of the application of this "St. Nicholas too" test:

> The application of such a test may prove troublesome in practice. Will a mere Santa Clause suffice, or must there also be a Mrs. Claus? Are reindeer needed? If so, will one do or must there be a full compliment of eight? Or is it now nine? Where in the works of Story, Cooley or Tribe are we to find answers to constitutional questions such as these?
>
> The point I am trying to make is a serious one, of course.

* * * * *

The symbolism of Christmas in the 20th Century A.D. continues to incorporate many pagan elements, and Christmas would hardly be Christmas, for most Americans, without them. But I question whether it is appropriate for federal courts to tell the towns and villages of America how much paganism they need to

> put into their Christmas decorations, and I am reluctant to attribute to the Supreme Court an intent to point us in that direction by implication.

Id.

The end result of the application of a physical content distinction of *Lynch* is the trivialization of the Constitution. As Judge Easterbrook observed in his dissenting opinion in *American Jewish Congress v. City of Chicago*:

> It is discomforting to think that our fundamental charter of government distinguishes between painted and white figures—a subject the parties have debated—and governs the elements of a display, thus requiring scrutiny more commonly associated with interior decorators than with the judiciary.

827 F.2d at 129.

Judge Easterbrook continued:

> It would be appalling to conduct litigation under the Establishment Clause as if it were a trademark case, with experts testifying about whether one display is really like another, and witnesses testifying that they were offended—but would have been less so were the creche five feet closer to the jumbo candy cane.

Id. at 130.

Clearly, the common sense reading of *Lynch* is one which focuses on the creche in the context of the holiday season and not on a headcount of ornaments and figurines in a holiday display. It avoids frivolous litigation over such meaningless matters as a few feet and a few characters and provides clear and understandable constitutional guidelines. Comment, *Constitutional Law—American Civil Liberties Union v. City of Birmingham: Establishment*

Clause Scrutiny of a Nativity Scene, 62 Notre Dame L. Rev. 114 (1986). Most of all, it complies with the wise admonition of Chief Justice Marshall who said: "[W]e must never forget, that it is *a constitution* we are expounding." *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 4 L.Ed. 579, 601 (1819). (emphasis added).

C. DISTINGUISHING *LYNCH* BASED ON THE LOCATION OF A MUNICIPAL CHRISTMAS DISPLAY IS WITHOUT PRECEDENT, PRESENTS AN EXAGGERATED NOTION OF GOVERNMENT ENDORSEMENT AND IMPOSES AN ABSOLUTIST VIEW OF THE ESTABLISHMENT CLAUSE

A physical context limitation of *Lynch* based upon the location of a nativity scene on public property is as unpersuasive as the limitation based upon content. As expressed by the majority in *American Jewish Congress v. City of Chicago*, this location limitation maintains that a nativity scene placed on public property is unconstitutional because the mere presence of such a religious symbol in a government building automatically creates the implication of government approval and unavoidably fosters an inappropriate identification with religion. *City of Chicago*, 827 F.2d at 128. Such a conclusion that the mere location of a religious symbol on public property is determinative of whether government endorses religion is seriously flawed in several respects.

First, unlike the court in *City of Chicago*, this Court has never used public property as a tripwire for Establishment Clause invalidity. Rather, this Court has always examined "all of the circumstances of a particular relationship" to determine the permissibility of a governmental

practice or program. *Lemon*, 403 U.S. at 614. This is demonstrated by the decisions of this Court in cases involving government sponsored religious practices or government programs advancing religion in the public schools. In these cases, this Court never relied upon the public property locus of the practice or program as the sole and exclusive reason for invalidating that practice or program under the Establishment Clause. Instead, this Court cited other concerns and factors such as the impressionable nature of elementary and secondary students, the inherent coercive nature of the practice or the clear intent of government to inculcate religious doctrine or to facilitate its dissemination as the bases for declaring that practice or program unconstitutional. *See, e.g., Edwards v. Aguillard*, 482 U.S. ___, 107 S.Ct. 2573 (1987) (Louisiana law requiring the balanced teaching of creation science and evolution); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (Alabama statute authorizing moment of silence for school prayer); *Stone v. Graham*, 449 U.S. 39 (1980) (posting a permanent copy of the Ten Commandments in classroom); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (statute forbidding the teaching of evolution); *Abington School District v. Schempp*, 374 U.S. 203 (1963) (daily reading of the Bible); *Engel v. Vitale* 370 U.S. 421 (1962) (recitation of denominationally neutral prayer); *Illinois ex. rel. McCollum v. Board of Education*, 333 U.S. 203 (1948) (religious instruction on school premises).

The relative non-importance of a public property locus to this Court's determination of the invalidity of a government practice under the Establishment Clause is further demonstrated by the case of *Marsh v. Chambers*, 463 U.S. 783 (1983). In *Marsh*, this Court upheld a clear religious practice—public prayer—by a publicly funded

clergyman not just on public property but at the very center of government: the chambers of a state legislature. Rejecting the argument that legislative prayer was "symbolically placing the government's official seal of approval on one religious view," this Court stated:

> [T]he practice of opening legislative sessions with prayer has become part of the fabric of our society.
>
> * * * *
>
> [I]t is simply a tolerable acknowledgement of beliefs widely held among the people of this country.

463 U.S. at 792.

This Court's treatment of public property as an insignificant happenstance in determining the constitutionality of a challenged program or practice is reflected as well in the *Lynch* decision itself. Although the display at issue in *Lynch* was located on private property, this Court implicitly dismissed the location of the display as a significant distinction. Chief Justice Burger expressly analogized the City of Pawtucket's display to "those to be found in hundreds of towns or cities across the nation—*often on public grounds*—during the Christmas season." *Lynch*, 465 U.S. at 671 (emphasis added).

Given the unimportance of public property as a factor in this Court's Establishment Clause decisions, the use of public property as an automatic invalidation device as was done in the *City of Chicago* case is unprecedented and improper.

Secondly, the location distinction of *Lynch* advanced by the *City of Chicago* case greatly exaggerates the threat to religious liberty posed by the display of a nativity scene on public property. In the *City of Chicago* case, the court

resorted to abstraction by maintaining that the display of a nativity scene on public property somehow suggested a symbolic alliance between government and Christianity, an alliance that indirectly but unmistakably coerced religious minorities. To support this abstract notion, the majority in *City of Chicago* cited the testimony of one offended individual. *City of Chicago,* 827 F.2d at 128n.3.

Preliminarily, one must seriously question whether a real threat to religious liberty can be based, as was done in the *City of Chicago,* upon the uncertain foundation of personal sensitivities. Paulsen, *Religion, Equality and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication,* 61 Notre Dame L.Rev. 311, 353 (1986); Crabb, *Religious Symbols, American Traditions and the Constitution,* 1984 B.Y.U.L. Rev. 509, 540 (1984); *cf., Illinois ex. rel. McCollum v. Board of Education,* 333 U.S. at 233 (Jackson, J., concurring).

But more importantly, there is nothing about a public property locus which suddenly and dramatically makes a passive display of a religious symbol more coercive or a greater threat to religious liberty than a display on private property. As the District Court pointed out in this case, no one "must read, or sing, or talk or pause, or do something affirmatively" in front of the display. (J.A. 10). This observation is applicable regardless of the location of a display. Citizens using the County Courthouse are as free to ignore the nativity scene as citizens using the private park in Pawtucket. Acknowledgement of the origins of a popular holiday does not compromise any citizen's religious preferences.

Moreover, even if the notion of a coercive symbolic union were valid in the abstract, it dissolves in the face of this case. The record is absolutely devoid of any indication

that the Courthouse display "has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh*, 463 U.S. at 794-95.

Finally, the position taken in *City of Chicago* that the location of an object or an article having a religious dimension on government property connotes governmental endorsement inevitably leads to an absolute separation of government and religion contrary to long-established judicial precedent. If the mere placement of an object or article having any religious significance or origin on government property is axiomatically an endorsement of religion as the majority in *City of Chicago* maintains, then the only inquiry left to a court is to determine whether the object or article has some religious dimension. Since a religious dimension is often times easily identifiable,[3] many objects currently displayed on government property[4] would be prohibited under the view advocated in the *City of Chicago* case.

But an inquiry which focuses exclusively on the religious component of any activity is contrary to the express teachings of *Lynch v. Donnelly*. This Court in *Lynch* rejected this simplistic view of focusing on the religious component of an activity or object. *Lynch*, 465 U.S. at 680. This Court declared that such an exclusive focus promoted an inevitable invalidation of the activity or practice under

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[3]In *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948), Justice Jackson declared: "The fact is that, for good or ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences." *Id.* at 236 (Jackson, J., concurring)

[4]Some obvious examples are religious paintings in government-sponsored galleries, Moses with the Ten Commandments in the Chambers of the Supreme Court and chapels in Congress. *Lynch v. Donnelly*, 465 U.S. at 677.

an absolutist view of the Establishment Clause, a position the Supreme Court has consistently rejected. *Id. at 678; see, e.g., Committee for Public Education & Religious Liberty v. Nyquist,* 413 U.S. 756, 765 (1973); *Lemon v. Kurtzman,* 403 U.S. 602, 614 (1971); *Walz v. Tax Commission* 357 U.S. 664, 671 (1970); *Zorach v. Clauson,* 343 U.S. 306 (1952).

In many counties and towns, the courthouse or city hall is the only publicly owned property. Thus, a blanket ban of nativity scene displays from county courthouses and city halls would, in effect, prohibit most municipal governments from erecting any Christmas holiday displays that include a creche. This result would circumvent the basic holdings of *Lynch v. Donnelly.*

In summary, a location distinction of *Lynch* is weak and unconvincing. It would require this Court to give special significance to a factor treated as essentially irrelevant in prior cases. It would greatly exaggerate the so-called threat to religious liberty conveyed by a passive symbol. It would impose an absolutist view of the Establishment Clause which would erroneously curtail, if not outright eliminate, government contact with objects having a religious element. For these reasons, the location context distinction of *Lynch* should be rejected.

III. ALLEGHENY COUNTY'S CHRISTMAS DISPLAY SATISFIED BOTH THE *LEMON* AND THE ENDORSEMENT OF RELIGION TESTS

Even if one accepts the curious notion that the constitutionality of a holiday display turns on its particular contents and location, Allegheny County's 1986 Christmas display still would pass constitutional muster. The County's display not only satisfies the *Lemon* test, as applied in *Lynch v. Donnelly,* but also the endorsement test proposed by Justice O'Connor.

A. *LEMON* TEST

In *Lemon,* this Court stated that a challenged governmental practice would pass constitutional muster if it had a secular legislative purpose, if its primary effect neither advanced nor inhibited religion, and if it did not foster an excessive entanglement with religion. *Lemon,* 403 U.S. at 612-13. A breach of any one prong of the *Lemon* test is sufficient to establish a violation of the Establishment Clause. *Edwards v. Aguillard,* 482 U.S. ___, ___, 107 S.Ct. 2573, 2577 (1987); *Stone v. Graham,* 449 U.S. 39, 41 (1980).

In *Lynch,* this Court stated that Pawtucket's purposes for its display of a nativity scene—to celebrate the Holiday and to depict the origins of the season—were legitimate secular purposes. *Lynch,* 465 U.S. at 681, 691. In this case, the stated purpose of the Courthouse display was to celebrate the season and to express the holiday wish of peace on earth, good will to men. (J.A. 175; Def. Ex. A; R. 51,52). The District Court found these statements of expressed purposes to be the actual purpose for the Courthouse display (Cert. Pet. 5a); moveover, no evidence was presented

to indicate that the County's expressed purposes were "a sham." *Edwards v. Aguillard,* 482 U.S. at ___, 107 S.Ct. at 2573. Since the County's stated purposes were consistent with the purposes determined to be permissible in *Lynch* and there is no evidence of an actual purpose to endorse religion, the display in the County Courthouse satisfies the *Lemon* purpose criterion.

In analyzing the effect prong of *Lemon,* the *Lynch* decision requires that the benefit to religion created by a nativity display must be compared with other types of government activities benefiting religion. *Lynch,* 465 U.S. at 684; Comment, *Constitutional Law—American Civil Liberties Union v. City of Birmingham: Establishment Clause Scrutiny of a Nativity Scene,* 62 Notre Dame L.Rev. at 122. Even assuming *arguendo* that the County Courthouse display accentuates the religious aspect of the display, the context of the season nevertheless renders the difference between the *Lynch* display and the County Courthouse display *de minimus.* Clearly, in the context of the season, the benefits to religion of a presence of a nativity scene inside the Courthouse are no less "indirect, remote and incidental" when compared to the major benefits and endorsements of religion by government held to be constitutional in other cases than in *Lynch. Religious Displays: ACLU v. City of Birmingham—Establishment Clause Analysis of An Isolated Creche Since Lynch,* 55 UMKC Law Rev. 665, 672 (1987). Thus, the Courthouse display meets the effect prong as interpreted in *Lynch.*

Finally, the danger of enduring administrative entanglement between church and state is virtually non-existent in this case. The contact between the County's Director of Communication and the moderator of the Holy Name Society, the owners of the display, to schedule the erection

of the display in conjunction with the choral program, is brief and innocently matter-of-fact. (J.A. 178). Additionally, the evidence presented before the District Court conclusively shows that the County provides no special security, lighting or maintenance for the display and has little, if any involvement, in its erection, arrangement and assembly. Thus, like the scene in *Lynch,* the display in the County Courthouse contains "nothing . . . like the comprehensive discriminating, and continuing state surveillance or enduring entanglement present in *Lemon*". *Lynch,* 465 U.S. at 684, *quoting, Lemon,* 403 U.S. at 619-622.

In sum, the application of the *Lemon* test in the fashion prescribed by this Court in *Lynch* to the facts of this case yields the same result as it did in *Lynch.* Like *Lynch,* the County's display has a secular purpose. Like *Lynch,* the Courthouse display confers only indirect, remote and incidental benefits on religion. Like *Lynch,* the County's display presents little danger of enduring administrative entanglement. Therefore, even if one accepts the questionable premise that this case is factually distinguishable from *Lynch,* the Courthouse display nevertheless is still constitutional. Note, *Lynch v. Donnelly: Breaking Down The Barriers to Religious Displays,* 71 Cornell L.Rev. 185, 202 (1985).

B. ENDORSEMENT TEST

In her concurring opinion in *Lynch v. Donnelly,* Justice O'Connor stated that every government practice must be judged in its own unique circumstances to determine whether it constitutes an endorsement or disapproval of religion. *Lynch,* 465 U.S. at 694. Expanding on her view that the purpose and effect prongs of the three-part test in

Lemon v. Kurtzman were essentially a measure of governmental endorsement of religion, Justice O'Connor provided guidelines for assessing endorsement in her concurring opinion in *Wallace v. Jaffree*, 472 U.S. 38 (1985). In *Wallace*, Justice O'Connor declared that the relevant issue was whether an objective observer acquainted with the history, language and administration of the practice at issue would perceive the practice as an endorsement of religion. *Wallace*, 472 U.S. at 73, 76. Applying the endorsement test articulated by Justice O'Connor in *Wallace* to the facts presented to the District Court, any reasonable observer must conclude that the County's seasonal display was to commemorate and celebrate Christmas as a national holiday which is part of the common cultural heritage of all Americans and not to endorse religion.

First, the nativity scene is displayed in the Gallery/Forum portion of the County Courthouse, an area used every day for cultural events and art exhibits. As one County witness noted, the Grand Staircase has been used to display sculpture (J.A. 190) and for ceremonies held by citizen groups unrelated to County government. (J.A. 176).

Even while the nativity scene is on display, the art exhibit in the area is clearly visible from the site of the nativity scene. (J.A. 163; Def. Ex. F, G; R. 126, 127). In none of the cases which factually distinguished *Lynch* was the nativity scene displayed in an area commonly accepted and constantly used as an art gallery and exhibit area. Moreover, the Gallery/Forum area is not even at the main entrance of the Courthouse. (J.A. 157). In light of these circumstances, it cannot be fairly said that the Courthouse display has a religious purpose or advances religion.

Secondly, the nativity scene is surrounded by many typical reminders of the Christmas holiday season, such as

evergreen trees, wreaths, ribbons and poinsettias (J.A. 162). Similar decorations, including wreaths, trees and Santa Clauses, are displayed by various Departments and offices throughout the County Courthouse building. (J.A. 167). (A twenty foot live spruce tree, which was displayed on the top landing of the Grand Staircase in past years, was removed only because it was a potential fire hazard. (J.A. 168-69)).

Thirdly, the County's display of a nativity scene is in conjunction with the County's Christmas choral program. (J.A. 174; Def. Ex. C; R. 126, 127). The choral program, which has been in existence since 1968, is managed by the County's Director of Communications. This program, however, is not a religious one. Rather, local choral and orchestral groups, primarily from local public high schools (J.A. 158), perform music of their own choosing every day at lunchtime on the Grand Staircase. (J.A. 169). A large banner (Def. Ex. H; R. 126, 128) and news releases (Def. Ex. C; R. 126, 127) publicize the event to the public. A public address system broadcasts the music to the pedestrians passing by the building. (J.A. 167). Following each group's performance, the County's Communications Department publicizes each group's participation by releasing photographs of its performance to local newspapers. (J.A. 169; Def. Ex. I; R. 126, 129).

The County's Director of Communications testified that the County's Christmas display, including the nativity scene, evergreen trees, and flowers, provide the scenic foreground or setting for these choral programs. (J.A. 174); his testimony is supported by photographs and news releases. (Def. Ex. I; R. 126, 129).

It is undisputed that the County's choral program and the performance of high school students on the Grand

Staircase is a purely secular event, which is dedicated to peace and brotherhood and to the families of prisoners of war and the missing in action in Southeast Asia. (J.A. 160). Given that Allegheny County's Christmas display is integrated into a purely secular choral program, it is clear that a nativity scene was not included simply to provide it with the trappings of government but as traditional celebration of the season with its customary symbols.

Finally, Allegheny County is far more removed than the municipal government in *Lynch v. Donnelly* from the erection and maintenance of its nativity scene. The nativity scene at issue in *Lynch* was not only owned by the City of Pawtucket, but it was erected by city workers and illuminated with lights and electricity paid for by the city. *Donnelly v. Lynch*, 525 F.Supp. 1150, 1154-5 (D. R.I. 1981). Opening ceremonies were conducted by the Mayor, who threw a main switch, which simultaneously lit the display and the lights in City Hall. *Donnelly*, 525 F.Supp. at 1176.

It contrast, Allegheny County has no involvement with the nativity scene displayed in the Courthouse, other than providing space to store it and a dolly to move it. The head of the Holy Name Society, which owns the creche, insists on transporting and assembling the entire scene by himself, without the assistance of any County employees. The County does not conduct any opening ceremony for the Christmas display. Nor does it provide any special lighting, heating or security. (J.A. 165). The owners of the nativity scene not only provide a sign indicating to the public that tax dollars have not been used to purchase the nativity scene (J.A. 164), but they even provide their own straw for the stable and manger. (J.A. 165). In comparison, an objective observer would be far less likely to perceive the County's nativity scene display as an endorsement of

religion than the display in *Lynch v. Donnelly*, which was held to be constitutional.

Thus, the use of the Gallery/Forum area for cultural, civic and artistic events, the numerous Christmas decorations present in the Gallery/Forum area and throughout the Courthouse building, and the longstanding secular choral program combine with the overall context of the holiday season, to demonstrate that what the County of Allegheny has endorsed is Christmas and its collection of symbols—carols, trees, wreaths, good will and the birth of the figure from whom the holiday takes its name as well as original significance. *City of Chicago*, 827 F.2d at 131 (Easterbrook, J., dissenting).

CONCLUSION

For the reasons stated, the judgment of the United States Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,

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Date: November 14, 1988

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JANE DOE and JOHN DOE,
Plaintiffs,
v.
THE CITY OF WARREN,
Defendant.

Civil Action
No. 87-30084

MEMORANDUM OPINION AND ORDER

At a session of said Court held in the Federal Building, Port Huron, Michigan, on the 20th day of October, 1988.

PRESENT: HONORABLE JAMES HARVEY
United States District Judge

This matter, involving the constitutionality of the defendant City of Warren's Christmas display, is before the Court on cross-motions for summary judgment. The plaintiffs allege that the inclusion in the display of certain religious symbols, specifically a creche and a menorah, violates the establishment clause of the first amendment of the United States Constitution. At a hearing on the plaintiff's motion for preliminary injunction, Judge Zatkoff found the display as secular in effect, and therefore denied the motion. The plaintiffs, pursuant to 42 U.S.C. §1983, continue to seek a permanent injunction, as well as money damages, against the defendant.

The Court concurs with the parties' assertion that no material issues of fact remain for resolution. The defendant displayed various symbols of the Christmas holiday

season, both secular and religious upon the front lawn of the Warren City Hall. These symbols included stars, candles, toy soldiers, a snowman, the creche, the menorah, and a Star of David. Based on these facts, the Court must determine whether, as a matter of law, the defendant City of Warren's holiday display violated the first amendment prohibition against governmental promotion of religion.

I.

The majority of establishment clause cases, and certainly Christmas display disputes, rely at least in part upon the Supreme Court's three-pronged analysis in *Lemon v. Kurtzman,* 403 U.S. 602 (1971), for resolution. This analysis requires assessments of the actual purpose of the display, of the principal or primary effect of the display, and of whether the display causes excessive government entanglement with religion. *Lemon,* 612, 613. Typically, these cases turn on the second prong of the *Lemon* analysis; that is, whether the principal or primary effect of the display neither advances nor inhibits religion. This requires a finding that such a display is not "more beneficial to and more an endorsement of religion" than the varied practices previously held nonviolative of the establishment clause by the Supreme Court.[1] *Lynch v. Donnelly,* 465 U.S. 668, 681-682 (1984). Thus, "not every law that confers an 'indirect', 'remote', or 'incidental' benefit upon [religion] is, for that reason alone, constitutionally invalid." *Lynch,* 683, citing *Committee for Public Education & Religious Liberty v. Nyquist,* 413 U.S. 756, 771 (1973)

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[1]Such practices include public funding of textbooks for church-sponsored schools, *Board of Education v. Allen,* 392 U.S. 236 (1968); noncategorical grants to church-affiliated colleges and universities, *Roemer v. Board of Public Works,* 426 U.S. 736 (1976); and tax exemptions for church properties, *Walz v. Tax Commission,* 397 U.S. 664 (1970).

In *Lynch*, the Supreme Court upheld the participation of the City of Pawtucket, Rhode Island, in the display of a creche, amidst several secular symbols, in a park owned by a nonprofit organization. In evaluating whether the city effectively endorsed religion through its inclusion of the creche, the Court referenced its earlier opinions sustaining legislative prayers and Sunday Closing Laws. *Marsh v. Chambers*, 463 U.S. 783 (1983); *McGowan v. Maryland*, 366 U.S. 420 (1961). The Court concluded that the effect of the city's inclusion of the creche "merely happens to coincide or harmonize with the tenets of some . . . religion." *Lynch*, 465 U.S. at 682, citing *McGowan, supra*, at 442. This effect was therefore distinguishable from the effect of providing religious instruction in public school classrooms, as well as the effect of the imparting of licensing veto authority in churches, found unconstitutional in *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948), and *Larken v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), respectively.

Having determined that the effect of the city's inclusion of the creche in the holiday display did not "confer a substantial and impermissible benefit on religion," and also having determined that a secular purpose, but no excessive administrative entanglement,[2] existed, the Court reversed the court of appeals and found the actions constitutional.

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[2]We have limited our discussion of *Lynch* to the "effect" prong of the *Lemon* analysis, since this is the only relevant inquiry on the present facts. Simply put, the Supreme Court in *Lynch* found that the city's use of the creche "to celebrate the Holiday and to depict the origins of that Holiday" established a secular purpose, and that the absence of day-to-day interaction between the church and the city regarding the creche supported the district court's finding of no excessive administrative entanglement. *Lynch*, 465 U.S. at 681, 684.

II.

The unfortunate consequence of the *Lynch* decision has been the tendency of lower federal courts to focus solely upon two factors in deciding the constitutionality of holiday displays. One factor might be termed "symbol counting," wherein a court apparently considers an entire display, places the secular symbols on one side and the religious symbols on the other, and waits for the balance to tip. *See American Civil Liberties Union v. City of Birmingham,* 791 F.2d 1561 (6th Cir. 1986), *cert denied,* 479 U.S. 939 (1986); *American Jewish Congress v. City of Chicago,* 827 F.2d 120 (7th Cir. 1987). While such an exercise may simplify the resolution of difficult issues, it could lead to the absurd result of inviting municipalities to add the constitutionally-mandated number of secular ornaments to a display in order to pass judicial muster. *See Birmingham, supra,* at 1567 (Nelson, J., dissenting). Additionally, by insisting on such an analysis, the courts will likely shift the central focus in holiday display cases from the effect of the displays to the actual purpose of the government in erecting them. *Lemon v. Kurtzman,* 403 U.S. 602 (1971).

The second factor given much consideration in the post-*Lynch* decisions involves the geographical placement of the displays. *Chicago, supra,* at 127, 128; *American Civil Liberties Union v. Allegheny County,* 842 F.2d 655, 662 (3rd Cir. 1988). *cert granted,* No. 87-2050 (Oct. 3, 1988). Both *Chicago* and *Allegheny County* strongly emphasize the importance of the fact that the displays at issue were placed on public property. In *Allegheny County,* for example, the court relied on the *Chicago* opinion and noted that "[e]ven more significant [than the physical nature of the display], however, was the circumstance that unlike that in *Lynch v. Donnelly* the creche in *Chicago* was placed at the

official headquarters of the government and not in a private park." 842 F.2d at 660. Thus, in both *Chicago* and *Allegheny,* the displays were ruled unconstitutional. While geographical placement is certainly a relevant factor under *Lynch,* according it some weight in determining the constitutionality of a holiday display, this Court fears that it has been used to displace the entire analysis contemplated in *Lynch.*

Perhaps these courts, in an acknowledgement of the *Lynch* observation that "each case . . . calls for line-drawing," concluded that symbol counting and geographical placement represented the correct criteria for drawing the constitutional lines. This method, however, ignores *Lynch's* further admonition that the establishment clause "erects a 'blurred, indistinct, and variable barrier depending on *all* the circumstances of a particular relationship.'" *Lynch,* 465 U.S. at 679, citing *Lemon, supra,* 403 U.S. at 614 (emphasis added). The circumstances of apparent importance in *Lynch* included the "context of the Christmas season," a factor virtually overlooked in the opinions previously discussed.[3] Moreover, the Supreme Court expressly noted the historical underpinnings of the Christmas holiday celebration, finding that the prohibition of the display of the creche "at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, and while the Congress and legislatures open sessions with prayers by paid chaplains would be a stilted overreaction contrary to our history and to our holdings." *Lynch, supra,* at 686. Given

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[3]In *Birmingham,* the court stated that it recognized the Supreme Court's identification of the context of the season as an important factor in deciding holiday display cases, yet its analysis of this factor centered solely upon the physical nature of the display itself, with no reference to the overall atmosphere of the season. 791 F.2d at 1566, 1567.

this perspective, the Court recognized that "[a]ny notion that these symbols pose a real danger of establishment of a state church is farfetched indeed." *Id.* This aspect of *Lynch* is also omitted from consideration in the subsequent circuit court opinions.

III.

The foregoing discussion suggests that the Supreme Court in *Lynch* contemplated a flexible analysis in deciding holiday display disputes, in which the "effect" prong of the *Lemon* test must be tempered by the recognition of the Christmas season and the secular and religious history underlying its celebration. In this framework, the symbol-counting and geographic placement factors relied on in the circuit court opinions would have some relevance, yet would not in and of themselves dictate the end result.

Applying this analysis to the present facts, we find that the City of Warren's holiday display does not violate the establishment clause of the first amendment. The City erects the display on December 1, a time by which the holiday season is traditionally acknowledged as having begun. As such, the display may be viewed as "engender[ing] a friendly community spirit of goodwill in keeping with the season." *Lynch,* 465 U.S. at 685. Clearly, this would not be the case were the creche displayed during other times of the year. The fact remains, however, that historically nativity scenes have gained a customary position in the ornamental celebration of the Christmas holiday season.

The fact that the display is located on the lawn of the Warren City Hall admittedly merits some concern. There

is no denying that such placement may, in some individuals' minds, raise some questions regarding the government's association with religion. Again, however, this factor must be viewed in the totality of the circumstances. This requires addressing the final factor, an assessment of the physical content of the display. Unlike in *Birmingham* or *Allegheny,* the display in the City of Warren includes several secular symbols, such that the appearance of church and state collusion is lessened. This is, after all, the central concern of the effect prong of *Lemon:* that the government not appear to endorse a religion. Given this, along with the use of the display during the holiday season in a manner historically recognized, we find that the City of Warren's City Hall display poses no real danger of establishment of a state church as prohibited by the first amendment.

IV.

While apprised of the Supreme Court's recent grant of *certiorari* in *Allegheny, supra,* the Court believes that the nature of this case is such that resolution of these motions at this time is required. The Court therefore **GRANTS** the defendant City of Warren's motion for summary judgment and **DENIES** the plaintiff's cross-motion for summary judgment.

IT IS SO ORDERED.

JAMES HARVEY

JAMES HARVEY
United States District Judge

(16) (9) (15)

87-2050, No. 88-90, 88-96

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CHABAD,

and *Petitioner*,

COUNTY OF ALLEGHENY and CITY OF PITTSBURGH,

v.

AMERICAN CIVIL LIBERTIES UNION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR PETITIONER CHABAD

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QUESTIONS PRESENTED

1. Whether the Establishment Clause prevents a municipality from permitting the placement, at no taxpayer expense, of a Jewish symbol adjacent to a Christmas tree more than twice its size as part of the municipality's seasonal display.

2. Whether a municipality that erects a seasonal Christian display is required, by the Establishment Clause's prohibition against denominational preferences, to permit inclusion of a privately funded Jewish symbol.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-90

CHABAD,

and *Petitioner*,

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v.

AMERICAN CIVIL LIBERTIES UNION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR PETITIONER CHABAD

OPINIONS BELOW

The decision of the court of appeals is reported at 842 F.2d 655. The rulings of the district court are unreported.

JURISDICTION

The decision of the court of appeals was filed on March 15, 1988, and timely petitions for rehearing were denied on April 19, 1988. The petition for a writ of certiorari in No. 88-90 was filed on July 15, 1988, and was granted on October 3, 1988. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATEMENT

1. *Introduction*

The federal government, all state governments, and thousands of municipalities throughout the United States mark the Christmas season each year with holiday displays on government property that ordinarily include Christmas trees, wreaths, lights, and other decorations.[1] The time of the year selected for these displays coincides with one of the most sacred religious holidays of the Christian calendar. The most important festivals of the Jewish year occur at other times—*i.e.*, in late September and early October (Rosh Hashanah, Yom Kippur, and Sukkot) and in April (Passover). There are no governmental displays for these Jewish holidays. But because the Jewish festival of Chanukah is also celebrated in December, some governmental agencies add a mark of respect for Americans of the Jewish faith to the symbols displayed publicly during the Christmas holiday season. The Jewish component is a *menorah*, or candelabrum, that can be used for the lights that are part of the Chanukah celebration. The constitutional issue in this case is whether the display on public property of this Jewish symbol, at a time when displays are primarily prompted by Christian tradition, violates the First Amendment's Establishment Clause.

2. *The Display*

The City of Pittsburgh has displayed a Christmas tree on the steps of its City-County Building for many years. Since at least 1979-1980—and possibly earlier—the City has placed a nine-branched candelabrum or "menorah"

---

[1] This Court described Christmas displays "found in hundreds of towns or cities across the Nation" in the opening section of its opinion in *Lynch v. Donnelly*, 465 U.S. 668, 671 (1984).

adjacent to its Christmas tree (J.A. 221-22).[2] In 1987, the City's display contained a 45-foot-high Christmas tree bearing lights and other ornaments, with an adjacent 18-foot-high menorah (J.A. 206-07). The tree stood on a platform that was 20 feet square and bore a sign reading:

> SALUTE TO LIBERTY
>
> DURING THIS HOLIDAY SEASON, THE CITY OF PITTSBURGH SALUTES LIBERTY. LET THESE FESTIVE LIGHTS REMIND US THAT WE ARE THE KEEPERS OF THE FLAME OF LIBERTY AND OUR LEGACY OF FREEDOM.
>
> RICHARD S. CALIGUIRI, MAYOR

The menorah is owned by Chabad and has been loaned to Pittsburgh, free of charge, for inclusion in the seasonal display (J.A. 290). The entire display, including the tree, its ornaments, the platform, the sign, and the menorah, is put in place each year by city employees. The usual procedure is that the platform is constructed first and the Christmas tree is placed on the platform several days thereafter. The "lifter" used for the tree is also used, at the same time, to move the menorah to its proper location. It takes approximately one hour to put up the menorah. The menorah is removed when the remainder of the display is removed. It is stored between seasons on city property (J.A. 219-24). The district court found that the added expense to the city of displaying the menorah is minimal (Pet. App. III, 39a).

---

[2] The nativity scene that is in controversy between the plaintiffs and Allegheny County is located in the Allegheny County Courthouse, which is one block away from Pittsburgh's City-County Building. It has nothing to do with the menorah's display apart from the fact that the plaintiffs chose to institute legal action jointly against both displays.

3. *The Menorah*

At issue is a candelabrum that, according to the testimony of experts introduced in the district court, has a cultural, universal and religious significance. It is used as part of the Jewish festival of Chanukah, which is an eight-day holiday celebrating the Jewish people's victory for religious and political freedom over the Seleucid Empire approximately 2,150 years ago (J.A. 138, 229). Following the victory, the Jewish community found enough pure oil to burn in the Temple's seven-branched candelabrum for only one day. The Talmud describes that the oil burned, instead, for eight days. On this account, Chanukah lights are lit each evening for eight consecutive nights, with an increasing number of candles each successive night. The Chanukah candelabrum has eight branches, with a ninth or "service" branch in the center (J.A. 139).

A menorah is used in Jewish homes for the ceremony of lighting Chanukah candles. The menorah itself has no inherent religious significance (J.A. 237-39, 309-10). It is not a holy object. It can be made from bottle caps or pieces of tin (J.A. 238). It may be discarded after being used and, at other times of the year, may be used for non-religious purposes such as to light a room (J.A. 238, 240). By contrast, Jewish ritual law prescribes what may be done with inherently religious objects. For instance, a Torah scroll, which is a handwritten parchment containing the Five Books of Moses, must be buried in a special manner when it is no longer usable. Many other rules pertain to its usage in deference to its sanctity (J.A. 237).

Rabbi Yisroel Rosenfeld, Chabad's expert, testified that there are many objects which remind one of a religious event but are not intrinsically sacred (J.A. 240-43). A symbol used during Chanukah is a "dreidle"—a top bearing Hebrew letters used in a Chanukah game. The Hebrew letters on a dreidle stand for the words "a

great miracle happened there" (J.A. 241-42). Potato pancakes are also eaten on Chanukah since they are fried in oil and remind observers of the miracle of the oil in the Temple. Neither the top nor the pancake is a sacred object (J.A. 242-43).

In addition to conveying an historical message regarding the above events, the menorah is a political symbol. Secular Jewish groups frequently use a menorah as a symbol (J.A. 310). The State of Israel uses a seven-branched menorah as a symbol (J.A. 310).

4. *The District Court's Decision*

The district court denied the plaintiffs' request for injunctive relief which sought to bar the City of Pittsburgh from displaying the menorah as part of its seasonal display. After a hearing on plaintiffs' motion for a preliminary injunction, the district court held that "the displays here both of the nativity scene presently in place and the proposed placing of the menorah are de minimis in the context of the application of the Establishment Clause" (J.A. 9). After permitting Chabad to intervene, the district court conducted a hearing during which testimony was provided regarding the use of the menorah (J.A. 211-318). Following that hearing, the district court entered judgment for the defendants. Insofar as the court's opinion involved the menorah, the court stated that the expense to the city in displaying the menorah was "minimal and of no consequence" (Pet. App. III, 39a), that the menorah "has no particular religious significance when placed in a public location beyond signifying a 'Light to the World' somewhat like the Christmas message 'Peace on Earth, Goodwill to Men'" (Pet. App. III, 39a), and that there was no evidence that the city was motivated by religious purposes (Pet. App. III, 40a).

5. *The Court of Appeals' Decision*

By a 2-to-1 vote, the court of appeals reversed. Applying the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the majority held that the second prong of the *Lemon* test is violated by the display of the menorah on the steps of the City-County Building. The majority said that "the only reasonable conclusion is that by permitting the creche and the menorah to be placed at the buildings the city and county have tacitly endorsed Christianity and Judaism and have therefore acted to advance religion." 842 F.2d at 662. Petitions for rehearing *in banc* were denied by a 7-to-5 vote.

INTRODUCTION AND SUMMARY OF ARGUMENT

The City of Pittsburgh long maintained a seasonal city display that expressed only the message of a Christian holiday—Christmas. Beginning approximately eight years ago, the city permitted a Jewish group to add to the city display a separate symbol that brings to mind, among other concepts, the Jewish holiday of Chanukah, celebrated at the same time of year as Christmas. This modification of the city's seasonal display has now been found unconstitutional on the ground that the added symbol (and *only* the added symbol) is a tacit endorsement of Judaism that "advances" religion and thereby violates the Establishment Clause. When considered in its full context, the added symbol—the menorah—does not constitute official "religious endorsement" at all. Indeed, the menorah's principal effect is to mitigate the appearance of one-sided official endorsement conveyed by a large Christmas tree on the steps of the city's central public building. Rather than endorsing a single faith, a menorah placed adjacent to a Christmas tree tells Pittsburgh's residents that the city is neutral on questions of religion—that all faiths may be represented in a city-maintained seasonal display.

The challenge to the menorah turns the principle of religious liberty upside down. Pittsburgh should be ap-

plauded for erecting a holiday display that demonstrates the religious diversity of this country. Instead, it is attacked by groups that shortsightedly view a single component of the city's display as official approval of a particular religion.

In fact, Pittsburgh's display is patently constitutional under the expressed views of both the majority and the dissent in *Lynch v. Donnelly*, 465 U.S. 668 (1984). The majority's reasons for permitting the display that was at issue in *Lynch* apply fully to this case. The secular purpose of Pittsburgh's display is expressed in the sign that stands before the Christmas tree. The "primary effect" of placing a menorah next to a Christmas tree is surely not to endorse the faith symbolized by the menorah. Rather, it represents openness and even-handedness. And there is no reason whatever for Pittsburgh's officials and any religious functionaries to have any administrative entanglement in the erection or removal of the display.

The *Lynch* dissenters should, we believe, also approve of the display of the menorah. When the symbol of a minority faith is displayed, there is no real danger that it will be taken as an alignment of government with that faith. That is particularly true if, as happened here, the minority's symbol stands side-by-side with a symbol that has religious meaning only to Christians. That combination is only an endorsement of religious even-handedness and total religious toleration.

Moreover, the menorah is not a religious symbol that is as significant to Judaism as a creche is to Christianity. A creche depicts an event that is at the heart of Christian theology. A menorah plays a substantially different role in Judaism. It is not a sacred or devotional object of worship, and it is not intrinsically holy. It is a national and cultural symbol for Jewish people, as well as a token of a particular holiday and religious observance. Indeed, it symbolizes various universal qualities that ex-

tend beyond the Jewish religion and the Jewish people. It is, in every practical sense, the analog of a Christmas tree, and its status under the Establishment Clause should be no different than that of a Christmas tree.

We note, moreover, that constitutional principles *compel* the City of Pittsburgh to grant Chabad the right to display the menorah. *Larson v. Valente*, 456 U.S. 228 (1982), prohibits denominational preferences. And if Christianity may be represented by a Christmas tree on the steps of the City-County Building, Pittsburgh must grant equal access, on request, to the symbols of other faiths. That result is required not merely by the Religion Clauses of the First Amendment, but also by its protection for freedom of expression.

ARGUMENT

I. PITTSBURGH'S DISPLAY OF THE MENORAH IS CLEARLY CONSTITUTIONAL UNDER THIS COURT'S DECISION IN *LYNCH v. DONNELLY*.

The dissenting judge in the court below accurately observed that this Court's decision in *Lynch v. Donnelly*, 465 U.S. 668 (1984), "directly addresses and conclusively resolves the dispute we encounter here." 842 F.2d at 666. The majority opinion acknowledged that "the starting point of our analysis should be *Lynch v. Donnelly*" (842 F.2d at 659), but it concluded that the *Lynch* decision did not control this case. We believe, for reasons elaborated at pp. 21-27, *infra*, that Pittsburgh's display of the menorah is constitutional even under the reasoning of the dissenting opinion in *Lynch*. But it is abundantly clear that the *Lynch* majority's views, as expressed in the Court's opinion by then Chief Justice Burger, require reversal of the decision below.

A. The Display Satisfies the Constitutional Standards Applied in the Majority Opinion in *Lynch v. Donnelly*.

Lynch involved, as does this case, the constitutionality of a municipality's public display erected during the Christmas season. This Court rejected an Establishment Clause challenge to the inclusion of a nativity scene in that display, although the Court acknowledged that the nativity scene was a Christian religious symbol.[3] The Court concluded that eliminating the creche from the city's Christmas display "would be a stilted overreaction contrary to our history and to our holdings" and that to view the creche as posing "a real danger of establishment of a state church" would be "far-fetched indeed." 465 U.S. at 686. These conclusions, as well as the reasons that underlie them, apply fully to the menorah display in this case.[4]

The *Lynch* Court analyzed the public display that was challenged in that case by the three-part standard applied in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). If the *Lemon* criteria, as explained in *Lynch* and applied most recently in *Bowen v. Kendrick*, 108 S. Ct. 2562 (1988), are applied, Pittsburgh's menorah plainly withstands constitutional attack.

1. *Display of the menorah serves a secular purpose.*— The *Lynch* Court treated the nativity scene as a religious one, but it rejected the argument that the creche's religious nature required its exclusion from the city's Christmas display. The Court observed that the creche could

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[3] The penultimate sentence of the opinion, which summarized the Court's decision, stated: "We hold that, *notwithstanding the religious significance of the creche*, the city of Pawtucket has not violated the Establishment Clause of the First Amendment." 465 U.S. at 687 (emphasis added).

[4] Since the creche displayed in the Allegheny County building is not involved in the controversy between Chabad and the plaintiffs, we do not discuss, in this brief, the constitutionality of that display.

not be viewed in isolation, but had to be evaluated in the context of the holiday season and the entire display. The Court said (465 U.S. at 681):

> The display is sponsored by the city to celebrate the Holiday and to depict the origins of that Holiday. These are legitimate secular purposes.

By the same reasoning, Pittsburgh's combined display of a Christmas tree and a menorah is designed "to celebrate" the Christmas and Jewish holidays of the particular season. Indeed, under the reasoning of *Lynch*, even if the menorah stood alone, its presence would merely "celebrate" the Jewish holiday and remind one of its origins, just as the creche did in *Lynch v. Donnelly*.

Moreover, the *Lynch* Court further defined the first of the three "prongs" of the *Lemon v. Kurtzman* test when it noted that "there is insufficient evidence to establish that the inclusion of the creche is a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message." 465 U.S. at 680. The same can surely be said of Pittsburgh's menorah. By no stretch of the imagination can it be deemed "a purposeful or surreptitious effort" to manifest "subtle governmental advocacy of a particular religious message." As we demonstrate later in this brief (pp. 24-26, *infra*), the menorah conveys far less of a "religious message" than a nativity scene. And its display in immediate juxtaposition with a Christmas tree surely refutes any suggestion that the government is intending to advocate a "particular" faith or religious practice or attempting to establish Judaism as the city's religion.

In this case, unlike *Lynch*, the trial judge, who heard the evidence, concluded that the menorah "was but an insignificant part of another holiday display" and that the display (along with that of Allegheny County) "had a secular purpose, [and] their purpose was not to ad-

vance or prohibit religion" (Pet. App. III, 40a). Indeed, even the court of appeals explicitly disclaimed any finding that there was a forbidden religious purpose behind the display of the menorah. 842 F.2d at 663.

The "purpose" of the joint display of the tree and the menorah was clearly expressed in the large sign that stood beneath the tree. It described the total scene as a "Salute to Liberty" and emphasized the message of the "festive lights"—*i.e.*, "that we are the keepers of the flame of liberty and our legacy of freedom." This was an overwhelmingly secular message.

In the courts below, the plaintiffs and an *amicus* argued that the dominant purpose of displaying a religious symbol *must* be to convey a religious message.[5] The Court in *Lynch* squarely rejected that argument, and it should be rejected here as well. If any message concerning religion was conveyed by display of the menorah, it was the message of religious liberty—reminding the citizenry of Pittsburgh that the United States welcomes the practice of all faiths, and that no one becomes a second-

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[5] This is not a case in which a religious ceremony is being performed on public property. The only issue in this case is whether the menorah may be *displayed*. There is some fragmentary testimony in the record to suggest that the menorah has, at times, been lit in a public ceremony. Whether the lighting is a religious observance of any kind, as well as how the lighting is carried out, are subjects that range far beyond the record made in the district court. The relief sought by the plaintiffs was not an injunction against lighting the menorah or against reciting any blessings in connection with its lighting. The requested relief was total removal of the menorah, and that is the relief that the court of appeals granted. Hence, it is that relief that must be judged in this Court. And, we submit, there is no basis in the Establishment Clause for prohibiting *display* of the menorah. Whether and to what extent the Establishment Clause might prohibit the recitation of blessings upon lighting a menorah that is displayed in a central public forum is a markedly different question than the one that was litigated below and is reviewed here on certiorari.

class citizen in this country because of his religious beliefs.

2. *The "primary effect" of the menorah's display is not to advance or benefit religion.*—In considering the second "prong" of the *Lemon* test, the *Lynch* Court first compared the quantum of assistance derived from a publicly financed creche with the various forms of financial aid to religious institutions that this Court had previously upheld against constitutional challenge. 465 U.S. at 681-82. That same comparison requires similar rejection here of the assertion that the "primary effect" of the menorah display is to benefit the Jewish faith. Display of a menorah is surely less beneficial to the Jewish religion than the loan of secular textbooks to Jewish religious schools, or the transportation of students to such schools, or federal grants for colleges that combine secular and Jewish religious education, or the exemption of synagogues and religious schools from local property taxes. This Court's decisions permitting such "benefits and endorsements" against claims that their "primary effect" is to aid religion require *a fortiori* rejection of a similar challenge based on the "primary effect" of a governmentally displayed menorah.

The *Lynch* Court also dealt with the principal ground on which the majority of the court of appeals relied in this case. The court below ruled that display of the menorah (and the creche in Allegheny County's building) violated the second "prong" of the *Lemon* standard because "the only reasonable conclusion is that by permitting the creche and the menorah to be placed at the buildings the city and county have tacitly endorsed Christianity and Judaism and have therefore acted to advance religion." 842 F.2d at 662. This same argument—*i.e.*, that the display of a religious symbol will be viewed as a governmental endorsement of the symbol's religion—was discussed and rejected in *Lynch*. The *Lynch* majority referred explicitly to the fact that "some observers may

perceive that the city has aligned itself with the Christian faith by including a Christian symbol in its display and that this serves to advance religion." 465 U.S. at 683. The *Lynch* Court held that this perception was only an "indirect, remote, and incidental" benefit to religion—no greater advancement of religion than legislative or executive proclamations recognizing the origins of the religious holiday.

To be sure, the *Lynch* case concerned a nativity scene on *private* property in the heart of town, and the present case concerns a display on *public* property. But the *Lynch* Court did not emphasize or, indeed, even mention the ownership of the site where the creche stood when it rejected the claim that its "primary effect" was to endorse a particular religious belief. Who held title to the land was plainly irrelevant to the decision in *Lynch*. The Court assumed there, as it may assume here, that because of the centrality of its location observers would view the display as governmentally sanctioned in one form or another. Nonetheless, the indirect, remote and incidental benefit to religion from the appearance of governmental endorsement was not great enough to affect the constitutionality of the display in *Lynch* and it should not affect the constitutional question here.

Moreover, the display in *Lynch* was *more* pervasively official than Pittsburgh's menorah display because the *Lynch* display had been purchased by the city and was, in fact, owned by the municipal government. In the present case, the menorah is owned by Chabad. It is loaned to the City of Pittsburgh for its use, and the city has spent no taxpayer funds to purchase or refurbish it.

Finally, in considering the "primary effect" of the display in this case, the Court cannot ignore the fact that, unlike the display in *Lynch*, Pittsburgh's display includes symbols of more than one religion. If the inclusion of an overwhelmingly Christian scene in an exclusively Chris-

tian holiday display only advanced religion indirectly, remotely and incidentally—as the *Lynch* Court held—the display of Jewish and Christian symbols side-by-side surely does not benefit or advance either religion in a constitutionally impermissible manner.

3. *Display of the menorah does not excessively entangle the city with religion.*—The *Lynch* Court found that the third criterion of the *Lemon* test did not justify a finding of unconstitutionality because there was no evidence of contact between government and the church on the content or design of the exhibit and no ongoing day-to-day interaction. 465 U.S. at 684. The same is true here. Although the court of appeals in this case did not discuss the "entanglement" aspect of the *Lemon v. Kurtzman* test, there is, in fact, no basis for claiming that there is any "entanglement" whatever. The evidence establishes that the City of Pittsburgh erects the display, including the menorah, on its own, removes it on its own, stores it by itself, and has no occasion to consult with Chabad on "content or design" or on any other aspect of the display (J.A. 224).[6]

Nor can it even be argued that there is "political divisiveness" of the sort that has occasionally been discussed in judicial opinions on the Establishment Clause. Since no governmental subsidies are involved, there is no possibility, much less likelihood, of political pressure to increase benefits for one faith at the cost of another, or to benefit religion generally at the expense of atheists or others who are non-religious. Consequently, display of the menorah plainly passes the third "prong" of the *Lemon v. Kurtzman* test.

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[6] It was suggested in the court below that the city must consult Chabad to learn the dates of Chanukah. In fact, the testimony establishes that the menorah is erected when the Christmas tree is erected, irrespective of the precise dates of Chanukah (J.A. 220). Moreover, the dates of Chanukah each year appear on most secular calendars. They are not a secret known only to Chabad.

B. The Display Satisfies the Standards of Justice O'Connor's Concurrence in *Lynch v. Donnelly*.

In her separate opinion, Justice O'Connor emphasized the first two "prongs" of the *Lemon* standard, laying to one side the subject of "political divisiveness" which, she said, "should not be an independent test of constitutionality." 465 U.S. at 689. Following her approach in *Lynch*, it is clear beyond a shadow of doubt that Pittsburgh's menorah display is constitutional.

1. *Pittsburgh did not intend to endorse Judaism.*—It is even more plain in this record than it was in *Lynch* that the city had no actual intention of communicating endorsement or disapproval of a particular religion by its display. The overriding purpose of including a menorah was to balance the holiday display—to demonstrate to religious minorities, such as Pittsburgh's Jewish residents—that the city's display of a Christmas tree was not intended to endorse Christianity or to demean non-Christians. Indeed, a Jewish county employee who is an individual plaintiff testified that this was his understanding of the city's motive in displaying the menorah (J.A. 127-28).[7] In this case, as in *Lynch*, the menorah cannot be separated from the full display. An observer sees the Christmas tree with its adjacent menorah, and the city's evident and apparent purpose must be determined from that over-all perspective.

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[7] Howard Elbling testified as follows:

> Q. What is your reaction to the display of the Menora?
>
> A. Well, it's, I have a mixed reaction to that one. In one respect I'm proud as a Jewish person that the symbol of my religion is displayed. However, I get the impression by the placement of that Menora next to a Christmas tree of similar size that they are mainly to appease Jewish people, and I'm offended by the fact that people are trying to equate Christmas and Hanukkah. The holidays have nothing to do with each other, they merely happen to fall in approximately the same period of time.

2. *The full display does not communicate government endorsement or disapproval of any religion.*—The factors that led Justice O'Connor to conclude that the creche at issue in the *Lynch* case did not communicate a governmental endorsement of Christianity apply, with even greater force, to the display of the menorah adjacent to a Christmas tree. In the context of Pittsburgh's display, the menorah celebrates the Jewish holiday of Chanukah in an extremely common form and in a manner that is understood by all reasonable people not to be an endorsement. During the December holiday season, the words "Happy Chanukah" frequently accompany "Merry Christmas" in public displays in order to demonstrate religious diversity and impartiality. By the same token, the symbol of the menorah is commonly displayed together with the symbol of the Christmas tree to show that no particular religion is favored or endorsed.

If, as Justice O'Connor concluded, the nativity scene in *Lynch* was merely a public "acknowledgment" of religion and could not be seen as an endorsement of Christianity (465 U.S. at 692-93), the display of the menorah in this case is surely no more than an acknowledgment. As we note at pp. 24-26, *infra*, the menorah is less sectarian and central to its faith than a creche is to Christianity; the menorah symbolizes national and cultural ideals as well as a religious observance. And when it appears immediately adjacent to a symbol that is identified with a Christian holiday and whose message is meaningful only to Christians, the menorah can hardly be viewed by any reasonable person as a governmental endorsement of Judaism.

C. The Display Affirmatively Implements the Values of the Religion Clauses of the First Amendment.

The relief sought here by the plaintiffs—led by a national organization whose overriding goal is to preserve civil liberties—singularly undermines the values of the

First Amendment. If the mandate of the court below were ever carried out, Pittsburgh would be officially recognizing only the Christian faith and only Christianity's important religious holidays. The 45-foot-high Christmas tree standing alone on the steps of Pittsburgh's City-County Building would convey to members of minority faiths the message that they are aliens in American society. Those who cannot identify with the religious theme of the Christmas tree and its lights would necessarily feel excluded in their own city.

By adding a menorah to its seasonal display, Pittsburgh promotes the values of religious pluralism that are the foundation of the first sixteen words of the First Amendment. The majority opinion in the *Lynch* case discussed, at some length, the "contemporaneous understanding" of the First Amendment's Establishment Clause and the role of religion in American public life. 465 U.S. at 673-78. It is clear from that history that expressions of religious belief have been encouraged in this country, and that our Constitution's philosophy is an "accommodation of all faiths and all forms of religious expression, and hostility toward none." 465 U.S. at 677. James Madison said in Federalist No. 51 that security for religious rights depends on "the multiplicity of sects." Our nation is proud of its "pluralistic society." 465 U.S. at 680. Freedom for all religions is part of our national heritage and is suitably saluted by Pittsburgh's display.

When the Christmas tree and the Chanukah menorah stand side-by-side, the message for most onlookers is one of total freedom and full religious toleration. No reasonable observer would feel coerced by the simultaneous expression of respect for two of mankind's greatest faiths. The removal of the menorah, sought short-sightedly by groups that claim to be advancing civil liberties, converts a message of freedom into a banner of exclusivity.

D. The Decisions of Lower Federal Courts After *Lynch* Do Not Warrant Any Different Result.

A number of federal appellate rulings since *Lynch* were read by the court below as justifying its conclusions. Even if those rulings were approved by this Court—a hypothesis that is not free of doubt—they would not sustain the decision of the court of appeals.

Two cases on which the court of appeals relied heavily —*American Civil Liberties Union v. City of Birmingham*, 791 F.2d 1561 (6th Cir.), *cert. denied*, 479 U.S. 939 (1986), and *American Jewish Congress v. City of Chicago*, 827 F.2d 120 (7th Cir. 1987)—found that the first prong of the *Lemon* standard—the "secular purpose" test—was satisfied. In *Birmingham*, it was sufficient that a publicly financed creche on the lawn of Birmingham City Hall was intended "to be in keeping with the expression of the total community toward" the Christmas period. 791 F.2d at 1565. The Sixth Circuit said that this justification refuted any claim that the actual purpose of the creche was to endorse religion.

By the same token, the majority in the *Chicago* case concluded that it was permissible, under the first component of the *Lemon* test, to "take official note of Christmas" by accommodating the religious sentiments of the city's Christian residents. The Court said that such responsive recognition "is not the same as intending to promote a particular point of view in religious matters." 827 F.2d at 127. The holdings in *Birmingham* and *Chicago*—as well as the parallel conclusion of the *Lynch* majority—compel the same result here.

In both *Birmingham* and *Chicago*, the Court majorities concluded that creches were unconstitutional under the second, or "primary effect," component of the *Lemon v. Kurtzman* standard. In each instance, a nativity scene stood by itself. The solitariness and high degree of religiosity of that display gave the impression of governmental endorsement of its religious message.

Pittsburgh's menorah does not stand alone. Looming over it is a Christmas tree. Plainly, Pittsburgh does not convey a message of endorsement for Judaism by this display.

Indeed, in the *Birmingham* case, the Court took note of the obvious fact that the creche represents the faith of the majority—Christianity. In this light, the Court concluded: "It is difficult to believe that the city's practice of displaying an unadorned creche on the city hall lawn would not convey to a non-Christian a message that the city endorses Christianity." 791 F.2d at 1566. And the Court in *Chicago* also held that the self-contained nativity scene in Chicago's City Hall "unavoidably fostered the inappropriate identification of the City of Chicago with Christianity." 827 F.2d at 128. Similar conclusions cannot be drawn on the facts of this case. This record parallels that of *Lynch* because the symbol that is challenged—the menorah—is only part of a larger display on the steps of the City-County Building.

Moreover, the menorah is, for reasons stated hereafter (pp. 24-26, *infra*), less of a religious symbol than others that have run afoul of the "primary effect" test. Precedents establish that the religious significance of a publicly displayed object is critical in determining whether the display has a primary or principal effect of advancing religion. For example, in *American Civil Liberties Union v. City of St. Charles*, 794 F.2d 265 (7th Cir.), *cert. denied*, 479 U.S. 961 (1986), a prominent display of a lighted Latin cross during the Christmas season was held to be impermissible. The Seventh Circuit held that the cross is the "principal symbol" of the Christian faith, and not of a particular holiday (as is a creche). 794 F.2d at 271, 273. Because of the "highly prominent place" of that symbol in an isolated display, the Court determined that the Establishment Clause had been violated. The present situation involving a symbol with

less religious significance in an overall seasonal display, is far removed from that of *St. Charles.*[8]

A comparison of the scene on the steps of Pittsburgh's City-County Building with the symbol that the Tenth Circuit found to violate the Establishment Clause in *Friedman v. Board of County Commissioners of Bernalillo County*, 781 F.2d 777, 783 (10th Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986), makes the point. Whereas approximately half of the Bernalillo County seal consisted of a Latin cross enclosed in a "blaze of golden light," with other objects, such as sheep, confirming the identification with the Catholic faith, the overall impression of the display on the steps of the City-County Building is not an endorsement of a particular religious faith. The Bernalillo County seal conveyed "a strong impression to the average observer that Christianity is being endorsed" (781 F.2d at 782), and it led "the average observer to the conclusion that the county government was 'advertising' the Catholic faith" (781 F.2d at 781). No "endorsement" or "advertisement" of any particular faith could possibly be assumed by the "average observer" who sees the seasonal display of Christian and Jewish symbols displayed by Pittsburgh.

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[8] The menorah's lesser degree of religious significance was admitted by the B'nai B'rith Anti-Defamation League, counsel for one of the plaintiffs, in its brief in the court of appeals. That brief stated (p. 18):

> Last, the Menorah does not have the same effect of advancing religion as the Nativity scene . . . . Moreover, while the Menorah commemorates a miracle in Jewish history, it does not have the centrality in the Jewish religion that the Nativity scene, which symbolizes the Messiah, has for Christianity.

II. THE REASONING OF THE DISSENTERS IN *LYNCH v. DONNELLY* SUPPORTS THE CONSTITUTIONALITY OF PITTSBURGH'S DISPLAY OF THE MENORAH.

If this Court follows the decision in *Lynch v. Donnelly*, the constitutionality of the menorah must be upheld. Our argument goes beyond *Lynch v. Donnelly*, however. We submit that Pittsburgh's display of the menorah is constitutional even under the views expressed by the dissenters in *Lynch*.

A. The Display Satisfies the Criteria of Constitutionality Enumerated in the *Lynch* Dissent.

The dissenters in *Lynch* took a different view of the three "prongs" of the *Lemon v. Kurtzman* test, and they would have found the nativity scene in that case unconstitutional under all three criteria. But if the dissent's reasoning is applied to the record facts in this case, a different conclusion emerges. By the standards of the *Lynch* dissent, Pittsburgh's menorah passes constitutional muster.

1. *Pittsburgh implements a secular purpose in a display that is not religiously exclusive.*—Justice Brennan's dissent in *Lynch* noted that there was no "contemporaneous expression" of a "clear secular purpose" for the display at issue in that case. 465 U.S. at 698. In the present case, the "Salute to Liberty" sign is such a "contemporaneous expression," and it plainly manifests the secular purpose that Pittsburgh has been trying to achieve. The "festive lights" of Christian and Jewish holidays signify the "flame of liberty" that is part of the country's "legacy of freedom"—and particularly religious freedom. That is plainly a proper secular purpose.[9]

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[9] Since the theme centers on "lights"—which are represented by the bulbs on the Christmas tree and the lamps or candles of the menorah—the same message could not be conveyed "by other means"—as the dissent in *Lynch* thought possible in that case. 465 U.S. at 699.

Moreover, Pittsburgh's display does not manifest "sectarian exclusivity," as did the display in *Lynch*. 465 U.S. at 700. The dissent in *Lynch* condemned the "sectarian purpose" that, in its view, prompted the inclusion of a "distinctively religious element" in an allegedly secular display. *Id.* By contrast, the addition of a menorah to the Christmas tree display that has traditionally stood at Pittsburgh's City-County Building made the display non-exclusive. Rather than evincing the narrow sectarian motive that the *Lynch* dissenters discerned in the challenged nativity scene, the menorah in Pittsburgh's display manifests government's openness and receptivity to the views of adherents of *all* faiths.

2. *Since inclusion of the menorah broadens Pittsburgh's holiday display, its "primary effect" does not advance religion.*—The dissent in *Lynch* viewed the creche as a form of "religious chauvinism" because it "singled out Christianity for special treatment." 465 U.S. at 701-02. On this account, the dissenters concluded that the creche's "primary effect" was "to place the government's imprimatur of approval on the particular religious beliefs exemplified by the creche." 465 U.S. at 701. In the present case, there is no "particular" religious belief that government appears to endorse when it places a menorah immediately adjacent to a Christmas tree. Instead, the message of the joint display is the message of "equal access" to "a broad spectrum of groups" that the *Lynch* dissenters believed to be constitutionally desirable. 465 U.S. at 702.

Terms like "advocacy," "alignment," "endorsement," and "imprimatur of approval"—all of which were used in the *Lynch* opinions—are appropriate when a single faith is selected for favored governmental treatment. In *Lynch*, the central issue was whether Christianity was impermissibly endorsed by a government-sanctioned dis-

play that gave no recognition to any other faith. The creche, in the view of the dissenters, "convey[ed] the message" that the views of minority religious groups "are not similarly worthy of public recognition nor entitled to public support." 465 U.S. at 701 (footnote omitted).

These considerations are absent when the issue is whether a Jewish symbol may be *added* to an otherwise unchallenged Christian display. In view of the towering presence of the Christmas tree beside the menorah, it is clear that Judaism is neither advocated nor endorsed by the City of Pittsburgh. Nor does the City "align itself" with Judaism or give it a governmental "imprimatur of approval" if it places an 18-foot-high menorah next to a 45-foot-high Christmas tree. No one can maintain, in these circumstances, that Judaism is granted "special treatment" or is the beneficiary of "religious chauvinism."

In contesting the majority's conclusions regarding the effect of the creche, the *Lynch* dissenters found it significant that Pawtucket had

> done nothing to disclaim government approval of the religious significance of the creche, to suggest that the creche represents only one religious symbol among many others that might be included in a seasonal display truly aimed at providing a wide catalog of ethnic and religious celebrations, or to disassociate itself from the religious content of the creche.

465 U.S. at 706. Here, all of these concerns are met. The sign in front of the display explains its secular purpose. The inclusion of a non-devotional symbol of another religion implicitly disassociates the city from the religious content of either symbol.

The dissenters noted that in *Abington School District v. Schempp*, 374 U.S. 203, 225 (1963), the Court had

stated that classroom Bible reading would be permissible if presented objectively as part of a secular education program. 465 U.S. at 706-07. Similarly, the *Lynch* dissenters concluded that a creche could play a secular role if it were in a museum setting, "in the company of other religiously inspired artifacts," because there would be "objective guarantees that the creche could not suggest that a particular faith had been singled out." 465 U.S. at 713. The inclusion of the menorah alongside the Christmas tree makes the Pittsburgh display the type of government acknowledgment of religion (without endorsement) that the *Lynch* dissenters cited as unobjectionable under the Establishment Clause.

3. *Pittsburgh's display creates no excessive administrative entanglements with religion.*—The *Lynch* dissent acknowledged that since the nativity scene had been erected without extensive consultation with religious officials, there was no administrative entanglement between religion and government. The dissenters were concerned that other religious groups would press for inclusion of their symbols, and accommodations to various demands would have to be made. 465 U.S. at 702.

Pittsburgh has, however, demonstrated its readiness to permit the symbols of non-Christian faiths to be displayed. A policy of open and equal access reduces, rather than aggravates, the constitutional difficulties. *See, e.g., Widmar v. Vincent*, 454 U.S. 263 (1981). Hence the prospect of future impermissible entanglement is less here than it was in *Lynch*.

B. The Menorah Is Not a Sacred Object and Its Display Does Not Involve Pittsburgh in Religious Observance.

The dissent in *Lynch* emphasized the holy character of the nativity scene at issue in the case (465 U.S. at 708-09), and the separately stated views of Justices Blackmun and Stevens decried the "misuse of a sacred symbol"

(465 U.S. at 727). The record in this case establishes that the menorah is not in the same category of devotional or sacred objects. It symbolizes not only a particular religious observance unique to Judaism, but also cultural and national aspirations, as well as universal human values.

Expert testimony in the district court established, to the satisfaction of the trial judge, that the Chanukah menorah "has no particular religious significance when placed in a public location beyond signifying a 'Light to the World' somewhat like the Christmas message 'Peace on Earth, Goodwill to Men'" (Pet. App. III, 39a). The district judge had ample basis in the testimony to arrive at this conclusion. Although the plaintiffs' expert witness, a rabbi of a Reform congregation, testified initially that a menorah is a "religious symbol" (J.A. 140; *see also* J.A. 24-25), he acknowledged on cross-examination that it is also viewed as a "cultural symbol" (J.A. 143, 145). Chabad's expert witnesses, who are Orthodox rabbis, said it was "incorrect" to characterize a menorah as a "purely religious symbol." Rabbi Yisroel Rosenfeld attested in an affidavit (J.A. 41-46) and in oral testimony (J.A. 225-306) that the menorah is not "an inherently religious object" (J.A. 237), that it carries historical and cultural messages of ethnic pride (J.A. 229-30), that it conveys universal messages of freedom of conscience and good will to all people (J.A. 230, 245, 302-04; Pet. App. III, 39a), and that it is also used as a political symbol, such as the symbol of the State of Israel (J.A. 240). A non-Hasidic Orthodox rabbi, not affiliated with Chabad, testified that the menorah itself has no religious significance whatever, and that the lighting of Chanukah candles satisfies the religious obligation even if no candelabrum is used (J.A. 309-10).

The same rabbi testified that the menorah is a symbol of the Jewish *people*, and not merely of the Jewish *religion* (J.A. 310). It is a display, therefore, of ethnicity, similar to a St. Patrick's Day parade (J.A. 229, 237).

The expert testimony established beyond any doubt that there is a critical difference, under Jewish religious doctrine, between a menorah used in the home—where there is a religious duty to light Chanukah candles—and the menorah in a public place—which is only a symbolic representation of Jewish cultural and religious values (J.A. 230-32). The district judge appreciated the thrust of this proof when he observed, during the testimony of Rabbi Rosenfeld (J.A. 234):

> He says, as I understand him, that it's not a obligation in the religious sense to light a menorah in a public place. Therefore, you're laying the ground work for an argument that this display of the menorah on the steps of the City-County Building was not necessarily a religious display, therefore, did not necessarily have any religious significance.

In short, this is not a case in which the city is maintaining an object that is worshipped by the faithful or that is an intrinsic part of an actual religious service. If a government agency erected an altar or a Holy Ark around which the members of a faith could conduct required religious services, the constitutional issue would be a different one. In this case, the findings of the district court established that the publicly displayed menorah, separated from the ritual of lighting in the home, conveys universal, historical, political and cultural messages, and not primarily religious ones (J.A. 230-33, 234, 236-37; Pet. App. III, 39a). Such a symbol—particularly when included in an ecumenical and eclectic seasonal display—presents no threat to the values protected by the Establishment Clause.

C. The Display Promotes First Amendment Values By Granting a Minority Faith Access to Public Property.

The *Lynch* dissent discussed, in great detail, the conflicting religious attitudes towards Christmas shown throughout American history (465 U.S. at 718-24), and

it emphasized the importance of preserving the rights of religious minorities (465 U.S. at 708-09). The dissenting opinion emphasized the constitutional values that protect "our remarkable and precious religious diversity." 465 U.S. at 697. The values of religious diversity are affirmatively served by a display that, like Pittsburgh's, includes a Chanukah menorah along with a Christmas tree.

The presence of the menorah beside the larger Christmas tree symbolizes the "remarkable and precious religious diversity" which makes Americans proud. Rather than amounting to "governmental favoritism toward one set of religious beliefs" (465 U.S. at 714), the placement of a menorah adjacent to a Christmas tree recognizes "the religious beliefs and practices of the American people as an aspect of our national history and culture." 465 U.S. at 716. It is surely not what the dissenters in *Lynch* believed the creche to be—"a coercive, though perhaps small, step toward establishing the sectarian preferences of the majority at the expense of the minority." 465 U.S. at 725.

The reasoning of the *Lynch* dissent would, we believe, condemn the elimination of the menorah from a display in which it stands by the side of a Christmas tree. Eradicating the menorah would, in these circumstances, substitute religious chauvinism for religious toleration.

III. THE CITY OF PITTSBURGH MAY NOT CONSTITUTIONALLY EXCLUDE FROM ITS DISPLAY SYMBOLS OF RELIGIOUS MINORITIES.

This case concerns the constitutionality of Pittsburgh's *voluntary* display of a menorah. The municipality's authorized officials determined that it was appropriate to place a menorah next to the Christmas tree that had traditionally stood on the steps of the City-County Building. For reasons previously stated, we believe that this decision was constitutionally permissible.

An additional reason for sustaining the constitutionality of Pittsburgh's voluntary decision to display the menorah is that Pittsburgh truly had no choice. It could not, consistently with this Court's rulings, permit a display of a Christian symbol such as a Christmas tree and, at the same time, turn down a request that equal treatment be afforded—at no expense to the public treasury—to an equivalent, non-devotional symbol of another faith.

In *Larson v. Valente*, 456 U.S. 228 (1982), this Court held that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." 456 U.S. at 244. The First Amendment requires "that every denomination . . . be equally at liberty to exercise and propagate its beliefs." 456 U.S. at 245. The constitutional prohibition against denominational preferences is essential not only to secure the rights guaranteed by the Establishment Clause, but also to preserve the liberties secured to minority faiths by the Free Exercise Clause.

The *Lynch* Court acknowledged that "we require strict scrutiny of a . . . practice patently discriminatory on its face," but saw nothing "explicitly discriminatory in the sense contemplated in *Larson*" in the Pawtucket display. 465 U.S. at 687, n.13. Here, by contrast, exclusion of the menorah from Pittsburgh's display would constitute patent discrimination against the Jewish religion. *Cf. American Civil Liberties Union v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1109 n.20 (11th Cir. 1983) (applying *Lemon* rather than *Larson* to erection of cross in state park because "no evidence has been presented concerning the state's refusal to approve construction of symbolic expressions of religions other than Christianity in state parklands").

Whether or not the Christmas tree has sanctity under Christian theology, there can be little doubt that it is a symbol with significance primarily for adherents to the

Christian faith. It has no roots in Jewish tradition or in the faiths of Moslems, Hindus, Buddhists, or other non-Christians. Yet the City of Pittsburgh apparently purchases and displays each year a tree that manifests this denominational preference.

The rule of *Larson v. Valente* prohibits such religious exclusivity. Any other religious group that seeks equal treatment is constitutionally entitled to obtain a comparable public spot where a similar non-devotional symbol may be displayed. That principle was articulated by Judge Arnold of the Court of Appeals for the Eighth Circuit when he dissented from a decision rejecting the constitutional right to display a menorah where a Christmas tree has been erected. *See Lubavitch of Iowa, Inc. v. Walters*, 808 F.2d 656, 657 (8th Cir. 1986):

> A Christmas tree owned by the State of Iowa has been erected in the rotunda of the state capitol. Another Christmas tree, also owned by the state, has been erected on the capitol grounds. The ornaments on the tree in the rotunda of the state capitol include angels. The state is obligated to treat all religions evenhandedly. Allowing the placement of these Christmas trees, while at the same time denying permission for the Menorah, appears to be a discrimination against the Jewish religion. So long as Chrismas symbols are permitted, other religions should be given equal treatment.
>
> I would therefore grant the relief sought by plaintiffs-appellants, leaving, however, to the state the option of removing any unattended Christmas trees from the state capitol and its grounds, in which event the state would be free not to allow any unattended Menorah on the capitol grounds.

It is no answer to argue, as the plaintiff did below, that Moslems, Unitarians, Buddhists, and atheists have no equivalent symbol in Pittsburgh's display. The fact is that none of these religious denominations and nonreligious groups have ever asked to be represented in the

display. If Pittsburgh were overwhelmed with demands for space in the display and could not find room on public property to satisfy all who made bona fide requests, the constitutional issue would be a substantially different one. But where the only request for equal treatment has come from a group whose request can easily be accommodated by the city, the Constitution prohibits discrimination as between competing faiths. The Religion Clauses require Pittsburgh to afford space for a Jewish symbol in its otherwise Christian holiday display.

We note, finally, that there is evidence in the record from which one may conclude that the steps of the City-County Building have been used in the past for public demonstrations. One witness testified that a demonstration on behalf of Soviet Jewry had been conducted at that location (J.A. 244-45). Since the primary hearing in this case was conducted before Chabad was permitted to intervene and no party during that hearing was motivated to establish that the steps of the building constituted a "public forum," there is only sketchy evidence on the subject.[10] Nonetheless, there is a substantial likelihood that the important governmental structure was the focus of public meetings, and that access to it is protected not only by the Religion Clauses of the First Amendment, but also by the constitutional protection for free expression.

In *McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984), *aff'd by an equally divided court sub nom. Board of Trustees of Village of Scarsdale v. McCreary*, 471 U.S. 83 (1985), the Court of Appeals for the Second Circuit held that the First Amendment's guarantee for free expression entitles church groups to have access to a city's "public forum" so as to display a nativity scene. To deny such access would violate the principle established

[10] Indeed, as soon as Chabad's trial counsel used the term "public forum," both counsel for the plaintiff and counsel for the city objected and sought to preclude use of that phrase (J.A. 234-36).

by this Court in *Widmar v. Vincent*, 454 U.S. 263 (1981), which prohibits official discrimination against speech because of its religious content.

In this case, the City of Pittsburgh could not, we submit, deny Chabad permission to display the menorah without violating the right of free expression recognized in *McCreary v. Stone*. Since Pittsburgh voluntarily displayed the menorah at Chabad's request, the issue was never litigated. But the "public forum" consideration in this case is an additional reason to uphold the authority of the city to include the menorah in its display.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the judgment of the district court reinstated.

Respectfully submitted,

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QUESTION PRESENTED

Whether the court of appeals correctly determined that the establishment clause of the First Amendment prohibits the government from endorsing religion by displaying a Nativity Scene and a Chanukah Menorah at buildings which represent the political authority of the state.

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Nos. 87-2050, 88-90 and 88-96

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

COUNTY OF ALLEGHENY, CITY OF PITTSBURGH, AND CHABAD,

Petitioners,

v.

AMERICAN CIVIL LIBERTIES UNION GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HOWARD ELBLING, HILARY SPATZ LEVINE, MAX LEVINE AND MALIK TUNADOR,

Respondents.

ON WRIT OF *CERTIORARI* TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENT MALIK TUNADOR

Statement of the Case

For several years, the County of Allegheny and the City of Pittsburgh have placed sectarian religious displays on the premises of the buildings which house their government offices. Allegheny County permits only government-authorized forms of expression in the courthouse. (J.A. 100.) The courthouse Nativity Scene contains figurines representing the Virgin Mary and Joseph kneeling in front of a baby Jesus attended by three kneeling shepherds whose hands are clasped in prayer. The shepherds represent the three wise men

who travelled to witness the miraculous birth of Jesus, as recounted in Matthew 2:11-12. An angel rests on the roof of the barn, holding a banner bearing the Latin inscription "Glory in Excelsis Deo," or "Glory to God in the Highest," taken from Luke 2:1. (J.A. 101-104.)

A large Chanukah Menorah stands on the steps of Pittsburgh's City-County Building. The Chanukah Menorah is a religious symbol commemorating miracles associated with the Jewish holiday of Chanukah, which marks the redemption of the ancient temple by the Jews.

In addition to various courts, the Allegheny County Courthouse contains the Sheriff's office, the offices of the County Treasurer, County Controller, County Commissioner, and the County Clerk. The Pittsburgh City-Council Building houses the Mayor's office, the City Council, the City-Treasurer, some civil courts and other governmental offices.

Anyone entering the Allegheny County Courthouse or passing by the Pittsburgh City-County Building cannot avoid seeing these religious displays. Plaintiffs of various religious faiths described the personal affront which they experienced upon viewing these religious symbols. Malik Tunador, a Moslem of Turkish origin, testified that he felt that his government was discriminating against him. (J.A. 112). Ellen Doyle, a Roman Catholic, and Howard Elbling, a Jewish resident of Pittsburgh, explained that the religious symbols offended them in a similar manner. (J.A. 101, 125.)

This lawsuit was initiated in district court to restrain Allegheny County from maintaining the Nativity Scene at the County Courthouse and to restrain the City of Pittsburgh from erecting a Chanukah Menorah at the City-County Building. Following a hearing on December 15, 1986, the district judge denied the requested preliminary injunction. Following a second hearing, the district judge entered an order denying the plaintiffs' motion for a permanent injunction and for declaratory relief. The plaintiffs appealed, and a majority of a panel of the United States Court of Appeals for the Third Circuit reversed the district judge. The Third Circuit applied the tripartite establishment clause analysis developed by this Court in *Lemon v. Kurtzman*, 403 U.S. 603, 612-613 (1971) and

held that the religious displays violated the second prong of the *Lemon* test by creating the appearance of government endorsement of religion. *A.C.L.U. v. County of Allegheny*, 842 F.2d 655 (3rd Cir. 1988).

After this Court granted *certiorari*, Petitioner Chabad brought a motion in the court of appeals asking it to stay its decision but, following *en banc* consideration, eleven of the twelve active judges on the appellate panel denied that motion. Chabad then brought a motion in this Court seeking to stay the lower court's decision. This Court denied that motion on November 28, 1988.

SUMMARY OF ARGUMENT

The court of appeals correctly held that the establishment clause prohibits the display of religious symbols on buildings which house government offices. These premises embody the political authority of the state, and religious symbols at these locations communicate the message that the represented faiths are endorsed or approved by the government. That message violates the establishment clause because it diminishes the political stature of those who do not adhere to the represented religions.

The court of appeals' analysis of the unconstitutional effect created by the physical setting of the religious symbols comports with this Court's consistent sensitivity to the constitutional significance of the physical environment of religious activities.

Historical examples of religion in our nation's public life do not affect the constitutional analysis in this case. The establishment clause examines only the effect of the two religious symbols at issue in this case in their particular settings; historical remarks and unrelated examples of religion in public life are constitutionally irrelevant.

Finally, Chabad's argument that the presence of a Christmas tree on the steps of the Pittsburgh City-County Building requires an accompanying display of a Chanukah Menorah is totally without merit. The First Amendment forbids government aid to any and all religions. The constitutional prohibition against governmental endorsement of one religion cannot be avoided by the government's endorsement of an additional religious faith.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE DISPLAYS OF RELIGIOUS SYMBOLS IN THE ALLEGHENY COUNTY COURTHOUSE AND THE PITTSBURGH CITY-COUNTY BUILDING VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

A. The Court of Appeals Correctly Determined That Religious Symbols On Property Devoted to The Core Functions of Government Violate The Establishment Clause.

The second prong of the tripartite establishment clause test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), prohibits government activities which have the effect of sponsoring or endorsing religion.[1] Applying the *Lemon* analysis, the court of appeals concluded that the religious displays violated the establishment clause chiefly because the displays occupied the premises of public buildings devoted to the core functions of government:

> Each display was located at or in a public building devoted to the core functions of government and each was placed at a prominent site at the public building where visitors would see it. . . . [T]he only reasonable conclusion is that by permitting the creche and the menorah to be placed at the buildings, the city and the county have tacitly endorsed Christianity and Judaism and have therefore acted to advance religion.

842 F.2d at 662.

In *American Jewish Congress v. City of Chicago*, the Seventh Circuit also recognized the impermissible message which flows from the display of religious symbols in a building which embodies the political authority of government:

> The presence of the government in Chicago's City Hall is unavoidable. The building is devoted to government functions: for example, both city and county government offices are located there, and the City Council holds its meetings there. Because City Hall is so plainly under government ownership and control, every display and activity in the building is implicitly marked with the stamp of government approval. The presence of a nativity scene in the lobby, therefore, inevitably creates a clear and strong impression that the local government tacitly endorses Christianity.

[1] To pass constitutional muster under the establishment clause, the challenged government activity must have a secular purpose, its primary effect must neither advance nor inhibit religion, and it must not foster excessive government entanglement with religion. 403 U.S. 602, 612-613.

> The message of endorsement is equally powerful on the symbolic level. Like the nativity scene itself, City Hall is a symbol—a symbol of government power. The very phrase "City Hall" is commonly used as a metaphor for government. A creche in City Hall thus brings together Church and State in a manner that unmistakably suggests their alliance. The display at issue in this case advanced religion by sending a message to the people of Chicago that the city approved of Christianity.

827 F.2d 120, 128 (7th Cir. 1987).

Other federal courts have also concluded that displays in these locations violate the establishment clause. In *Burelle v. City of Nashua*, a district judge held that the primary effect of a privately-owned creche at the entrance of the "building which houses the municipal government offices of the City of Nashua" conveys to the public the implicit message of government support for the religion represented by the creche. 599 F. Supp. 792, 793, 795 (D.N.H. 1984). Similarly, in *A.C.L.U. v. Mississippi State General Services Adm'n*, the district court held that the display of a cross on a state office building unconstitutionally endorses religion. 652 F. Supp. 380 (S.D. Miss. 1987). Most recently, in *Smith v. Lindstrom*, a district judge in Virginia also concluded that a religious display located at the seat of government violated the establishment clause. The memorandum opinion in that case is reprinted and attached hereto as an appendix. In *Smith*, the court analyzed at length the constitutional significance of the county office building in Albemarle County, and held, "[t]hus, the location of the instant creche, displayed prominently with an unseverable visual association between the trappings of County government and the religious symbols, created the unmistakable message of endorsement." App. 22a. The district judge emphasized that a religious display at the offices of government could not pass constitutional muster because it communicated a message of government endorsement of religion. *See also, A.C.L.U. v. City of St. Charles*, 794 F.2d 265, 271 (7th Cir. 1986) (Latin cross "prominently displayed on a public building that is clearly marked as and known to be such . . . dramatically conveys a message of governmental support for Christianity").

The court of appeals' determination in the instant case that placing religious displays in buildings which house the government unconstitutionally unites church and state comports with the deci-

sions of this Court. In *Grand Rapids Sch. Dist. v. Ball*, Justice Brennan explained that the establishment clause forbids the union of the symbols of government and religion:

> [A]n important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by nonadherents as a disapproval, of their individual religious choices.

473 U.S. 374, 391 (1985).

The placement of the two religious displays in this case manifestly unites the authority of government with the widely known symbols of two major religious traditions. The establishment clause prohibits that symbolic link which arises when any religion acquires a special influence or relationship with the government. *Larkin v. Grendel's Den*, 459 U.S. 116, 125-126 (1982). *Lemon* requires an examination of all of the circumstances of challenged government activities. 403 U.S. at 614. Under the circumstances of the present case, the state endorsed two particular religions by representing them in the buildings which epitomize the authority of government. The court of appeals correctly determined that displaying religious symbols which commemorate sacred religious events in the corridors of government communicates the constitutionally impermissible message that certain religions are favored by the state.

Petitioners and *amici* attempt to confuse the symbolic nature of a county courthouse or a city-county building with other forms of public property. For the purposes of the First Amendment, however, this Court has long distinguished between various forms of public property. In *Perry Educ. Ass'n. v. Perry Local Educator's Ass'n*, 460 U.S. 3, 44 (1983), Justice White stated explicitly that the First Amendment distinguishes between different forms of government property:

> The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue.

The First Amendment attributes of government property clearly vary with the location. *Greer v. Spock*, 424 U.S. 828 (1976). The court of appeals properly concluded that activities conducted on the

premises of buildings which house the political offices of government are implicitly endorsed by the state. In the words of the Seventh Circuit, "the very phrase 'City Hall' is commonly used as a metaphor for government." *American Jewish Congress v. City of Chicago*, 827 F.2d at 128.

B. The Court Of Appeals Decision Complies With The Purpose Underlying The Constitutional Prohibition Against Government Endorsement Of Religion.

The establishment clause prohibits the social alienation which results from governmental endorsement of particular religions. Justice O'Connor described this fundamental purpose of the establishment clause in her concurring opinion in *Lynch:*

> The establishment clause prohibits the government from making adherence to a religion relevant in any way to a person's standing in the political community. . . . Endorsement sends a message to non-adherents that they are outsiders, not full members of the political community.

465 U.S. at 689. In *Wallace v. Jaffree*, Justice O'Connor reaffirmed this understanding of the establishment clause:

> The *Lynch* concurrence suggested that the religious liberty protected by the Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community. Direct government action endorsing religion or a particular religious practice is invalid under this approach because it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." Under this view, *Lemon*'s inquiry as to the purpose and effect of a statute requires courts to examine whether the government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement. (Citations omitted.)

472 U.S. 38, 69 (1985).

The undisputed evidence in this case demonstrates that the religious displays at issue cannot pass constitutional muster under this analysis. Malik Tunador, a Moslem, testified that he viewed the

Nativity Scene in the Allegheny County Courthouse when he went there to pick up an application for the extenstion of his passport. (J.A. 109.) He explained that upon seeing the creche he felt that his government was supporting a particular religion in preference to his religious beliefs. (J.A. 112.) The unconstitutionality of displaying a creche inside the county courthouse could be no more aptly demonstrated than through Mr. Tunador's experience. In acquiring a passport, one of the political benefits of citizenship, Mr. Tunador was confronted with stark evidence that he is not a full member of his political community.

Justice O'Connor expanded upon the endorsement test in *Wallace:*

> The endorsement test does not preclude government from acknowledging religion or from taking religion into acount in making law and policy. It does preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred. Such an endorsement infringes the religious liberty of the nonadherent, for "when the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." (Citations omitted).

472 U.S. at 70. Sectarian religious symbols in the hallways and entranceways of the buildings which symbolize the government unconstitutionally diminish the political stature of those who do not adhere to the religious faiths represented there. The establishment clause prohibits the government from maintaining religious displays which demean religious minorities.

C. The Establishment Clause Forbids Governmental Endorsement Of Religion Regardless Of The Level Of Coercion.

Petitioners and *amici* urge that the Nativity Scene and the Chanukah Menorah do not run afoul of the establishment clause because they do not coerce anyone to act, speak, or believe in any manner. As Justice Powell made clear in *Committee For Public Educ. & Religious Liberty v. Nyquist*, "[t]he absence of any element of coercion, however, is irrelevant to questions arising under the

establishment clause." 413 U.S. 756, 785 (1973). The second prong of the *Lemon* test focuses solely upon the effect of the challenged governmental activity. 403 U.S. at 612. The establishment clause does not merely forbid the government from requiring its citizens to recite certain prayers or to genuflect before chosen symbols; it prohibits activities which have the effect of communicating governmental endorsement of religion. In *Lynch*, Justice O'Connor explained:

> The central issue in this case is whether Pawtucket has endorsed Christianity by its display of the creche. To answer that question, we must examine both what Pawtucket intended to communicate in displaying the creche and what message the city's display actually conveyed. The purpose and effect prongs of the *Lemon* test represent these two aspects of the meaning of the city's action. . . . The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.

465 U.S at 690.

Petitioners' novel restatement of the establishment clause would tolerate government practices which this Court has held unconstitutional. In *McCollum v. Board of Educ.*, 333 U.S. 203 (1948), and in *Abington v. Schempp*, 374 U.S. 203 (1963), this Court struck down voluntary religious activities in the public schools, notwithstanding provisions which allowed students not to participate. The issue of coercion is germane only in determinations under the free exercise clause of the First Amendment, which is not at issue in this case. *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707 (1981). Petitioners' argument reverses constitutional analysis under the religious liberty clauses. The argument that the religious symbols may withstand constitutional scrutiny simply because they do not compel action or belief is entirely without merit or relevance under the establishment clause.

II. The Court of Appeals' Location-Oriented Analysis is Mandated by the Establishment Clause.

A. The Court of Appeals Correctly Examined The Character Of The Specific Locations Of The Religious Symbols.

Although the County of Allegheny and *amici* criticize the court of appeals for drawing constitutional distinctions based upon the

specific locations of the Chanukah Menorah and the Nativity Scene, the establishment clause requires such an inquiry. As noted above, Chief Justice Burger and Justice O'Connor reaffirmed in *Lynch* the necessity of analyzing the effect created by the particular circumstances of each case. The First Amendment frequently requires that fine distinctions be drawn. In *Walz v. Tax Commission*, Chief Justice Burger, writing for the Court, explained, "it is an essential part of adjudication to draw distinctions, even fine ones, in the process of interpreting the constitution." 397 U.S. 664, 669 (1970).

Petitioners also suggest that an emphasis on location leads to an absolutist interpretation of the First Amendment. This Court's approach to establishment clause issues invariably includes a sensitivity to the physical context of the challenged activities, yet this has produced a careful, case-by-case review, not absolutism. *Lynch*, 465 U.S. at 678. In *McCollum v. Board of Educ.*, 333 U.S. 203 (1948), this Court struck down a program which permitted teachers affiliated with sectarian religious institutions to provide instruction inside the public schools. Emphasizing the unconstitutional proximity of government and religion, Justice Black explained:

> The state's tax supported public school buildings are used for the dissemination of religious doctrine . . . . This is not separation of Church and State.

333 U.S. at 212.

Four years later, however, this Court distinguished a released-time program which took advantage of the machinery of the state public school system to allow for voluntary religious instruction near, but not on, the premises of the public schools. *Zorach v. Clauson*, 343 U.S. 306 (1952). Justice Douglas recognized that "the school is a crutch on which the churches are leaning for support in their religious training" but distinguished *McCollum* because the instruction did not take place inside the public school facilities. 343 U.S. at 315. Establishment clause determinations obviously vary depending on the physical setting of the challenged activity.

School prayer decisions also illustrate this Court's attentiveness to the constitutional significance of the physical environment of

religious activities. In *Engel v. Vitale*, this Court held unconstitutional the practice of reciting prayers in public schools:

> We think that by using its public school system to encourage recitation of the Regents' prayer, the State of New York has adopted a practice wholly inconsistent with the establishment clause.

370 U.S. 422, 424 (1962). Yet prayer in the setting of a state university does not offend the establishment clause. *Widmar v. Vincent*, 454 U.S. 263 (1981). Examining the effects of state-sanctioned prayer in yet another physical environment, this Court also upheld a government funded chaplaincy in a state legislature. *Marsh v. Chambers*, 463 U.S. 783 (1983).

Location-sensitive reasoning clearly is one of the hallmarks of establishment clause jurisprudence. The provision which prohibits the display of the Ten Commandments in a public school system does not proscribe the presence of the same legal code in the chambers of this Court. *Stone v. Graham*, 449 U.S. 39 (1980). In holding that the religious symbols at the Allegheny County Courthouse and the Pittsburgh City-County Building unconstitutionally united government and religion, the court of appeals applied the proper analytical framework by considering their physical context.

B. The Court of Appeals Correctly Distinguished *Lynch v. Donnelly*.

Although this Court has previously considered the constitutionality of religious displays, those cases have not involved the message of government endorsement of religion communicated by the particular context of this case. *Lynch v. Donnelly*, 465 U.S. 668 (1984); *McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984), *aff'd by an equally divided Court*, 471 U.S. 83 (1985).

The court of appeals properly recognized that while *Lynch* is a significant decision, it is closely tied to its facts. 842 F.2d at 660. In *Lynch*, this Court held that a municipality's limited financial support for a Nativity Scene erected by private citizens in a private park did not violate the establishment clause. Unlike the present case, however, there was no public manifestation of the government's sponsorship of the religious display.

More importantly, this Court emphasized repeatedly that the *Lynch* decision does *not* stand for broad propositions extending beyond the context of the case. Chief Justice Burger initiated the Court's analysis by underscoring the constitutional significance of the particular facts of each case under the establishment clause: "In each case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed." 465 U.S at 678. Citing *Lemon*, Chief Justice Burger stressed that analysis under the establishment clause is closely tied to the facts of the case. *Id.* In holding that the Pawtucket display did not arise from an impermissible religious purpose under the first prong of the *Lemon* test, Chief Justice Burger once again emphasized the specific factual context then before the Court:

> When viewed in the proper context of the Christmas Holiday season, it is apparent that, *on this record*, there is insufficient evidence to establish that the inclusion of the creche is a purposeful or surreptitious effort to express some kind of subtle government advocacy of a particular religious message. (Emphasis added.)

465 U.S. at 682.

In her concurrence, Justice O'Connor also stressed several times that *Lynch* arose from and is limited to the specific factual circumstances then before the Court. After concluding that the display of the Pawtucket creche "in this particular setting" did not constitute a violation of the establishment clause, Justice O'Connor continued:

> Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion. . . . I cannot say that the *particular creche display at issue in this case* was intended to endorse or had the effect of endorsing Christianity. (Emphasis added.)

465 U.S. 694. Unlike the passive symbols in *Lynch*, the particular religious symbols at issue here dominate the interior and exterior of buildings which house the vital organs of government.

In *McCreary*, this Court's only other consideration of the constitutionality of a religious display, four Justices affirmed without opinion a decision of the Second Circuit which held that the First Amendment's guarantee of free speech prohibits the government from discriminating against religious expression in the context of a

public forum. 471 U.S. 83 (1985) Significantly, the Second Circuit in *McCreary* explicitly noted that religious expression in a traditional public forum does not bear the imprimatur of government approval. 739 F.2d at 724. The setting of the present case, however, symbolizes the very essence of government.

Although petitioners, at this late hour, attempt to show that the Allegheny County Courthouse bears some of the characteristics of a public forum, the record is devoid of any support for this argument, and in fact demonstrates that precisely the opposite is true. While various cultural programs do occur inside the county courthouse, no activity may take place without receiving prior approval from the county. Ms. Minteer, the Manager of the Bureau of Cultural Programs for the County of Allegheny, described the written policy which governs displays inside the courthouse. A government official may withhold approval over all forms of expression in the courthouse. (J.A. 200-202.)

A forum in which government authorities exercise content-based restrictions upon expression does not constitute a public forum. *See, e.g., Widmar v. Vincent; Perry*. Being subject to such restrictions, the Allegheny County Courthouse plainly does not constitute a public forum. No evidence was presented regarding the use of the steps of the Pittsburgh City-County Building for the purposes of expression. Accordingly, there is no support for the proposition that the City-County Building is a public forum.

In sum, the court of appeals properly analyzed the physical context presented in this case. Heeding the limits of *Lynch*, the court of appeals examined the constitutional significance of the symbolic effect of the physical locations of the two religious displays under the *Lemon* test and properly held that those displays do not withstand constitutional scrutiny.

III. Examples of Religion in Public Life are Constitutionally Irrelevant to the First Amendment Issues Raised by the Nativity Scene and the Chanukah Menorah.

Citing the role of religion in our national heritage, *amici* ignore the specific facts of this case and zealously defend various references to religion in our nation's public life. This case, however, does not

involve a biblical verse on a national monument or a piece of art depicting a kneeling George Washington. This case concerns only the constitutionality of government sponsorship of two particular religious symbols at two particular locations. The court of appeals explicitly limited its decision to the facts presented in the case:

> Nor are we concerned with the use of religious objects in a museum or as educational instruments in a classroom, in which circumstances the objects could be presented neutrally. Thus, it could not reasonably be believed that the school authorities were endorsing a religion if they included a display of a creche or a menorah as a demonstration of religious objects in a history course. Similarly, a display of religious paintings in a public museum merely reflects an appreciation of the artistic value of the objects. Here, however, the effect is different as it is evident that the religious displays of the city and county have the effect of endorsing the messages reflected by the displays. This is unconstitutional.

842 F.2d at 663.

Although *amici* imply that respondents oppose the role of religion in our national heritage, to the contrary, the respondents in this case include clergy and lay figures committed to promoting our precious heritage of religious freedom. *Amici* draw extensively upon various examples of religious references in the remarks of historical American figures whose eighteenth century discourse was fraught with religious allusions. Such examples, many of which in any event predate the ratification of the First Amendment, cannot dictate contemporary constitutional analysis.

This nation's religious composition is vastly more diverse than it was two hundred years ago. *Abington v. Schempp*, 374 U.S. 203, 241 (Brennan, J., concurring). In *Abington*, Justice Brennan cautioned against relying too heavily in matters of religious liberty upon the advice of the founding fathers, because their message may not be relevant to a society more heterogenous than theirs. *Id.*

A modern establishment clause debate is poorly informed by brandishing conflicting views extracted from the speeches and correspondence of eighteenth century politicians. For each example of an early president's invocation of divine authority there can be found another's principled refusal to permit any sectarian influences upon

government. As this Court has noted, both Thomas Jefferson and Andrew Jackson refused on establishment clause grounds to declare national days of Thanksgiving or fasting during their respective terms as president. *Abington*, 463 U.S. at 807. Rather than dismissing minor encroachments on the establishment clause as harmless acknowledgements of our national Christian heritage, James Madison urged vigilance against the establishment of this familiar faith in our nation's political institutions:

> It is proper to take alarm at the first experiment on our liberties. . . . Who does not see that the same authority which can establish Christianity . . . may establish with the same ease any particular sect of Christianity, in exclusion of other sects?

"Memorial & Remonstrance Against Religious Assessments," 5 *The Founders' Constitution* 82 (1987).

In *Lynch*, Justice O'Connor emphasized that historical customs do not determine whether a particular activity violates the establishment clause:

> [W]hether a government activity communicates endorsement of religion is not a question of simple historical fact. Although evidentiary submissions may help answer it, the question is, like the question whether racial or sex based classifications communicate an invidious message, in large part a legal question to be answered on the basis of judicial interpretation of social facts.

465 U.S. 693-694. The social facts of this case clearly demonstrate that Malik Tunador and others felt demeaned by their government's display of the two religious symbols present in this case. The analysis of this case is governed by the constitutional effect of this social reality, not by references to centuries-old expressions of humility before a divine authority. As Justice Brennan pointed out in his dissent in *Marsh v. Chambers:*

> We have recognized in a wide variety of constitutional contexts that the practices that were in place at the time any particular guarantee was enacted into the constitution do not necessarily fix forever the meaning of that guarantee.

463 U.S. at 816.

The First Amendment requires the Court to translate the "majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the Eighteenth Century, into concrete restraints on officials dealing with the problems of the twentieth century." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943). President John Adams issued a series of official proclamations which called upon Americans to engage in Christian prayer. *Marsh*, 463 U.S. at 818, (Brennan, J., dissenting). The mere passage of time does not render constitutional a practice which may have gone unchallenged long ago.

IV. The Presence of a Christmas Tree Does Not Require the City of Pittsburgh to Display a Chanukah Menorah.

Petitioner Chabad contends that the First Amendment requires the City of Pittsburgh to display a Chanukah Menorah on the steps of the City-County Building because a Christmas tree is on display there. This proposition is without legal or factual foundation. Indeed, the argument concedes that such displays violate the establishment clause through the government's support for particular faiths or denominations.

Chabad contends first that a seasonal Christmas tree is a religious symbol. The trial court received no evidence concerning the religious symbolism of the Christmas tree. In *Lynch*, Chief Justice Burger classified the Christmas tree as one of the secular decorations of the holiday season, indicating that it lacked religious significance. 465 U.S. at 671.

Working on the assumption that the Christmas tree constitutes a religious symbol, Chabad argues that the government must also display a Chanukah Menorah to avoid preferring one religion over another. That position reveals the patent constitutional violation presented by the display of religious symbols on the premises of buildings which symbolize the government. Under this analysis, the unconstitutional governmental preference for one religion would be cured by coupling with it another such unconstitutional display. This Court explained in *Grand Rapids* that multidenominational endorse-

ments are no more constitutional than government support for a single faith:

> Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any—or all—religious denominations.

473 U.S. at 389. Chabad's interpretation of the First Amendment would result in a system that accommodates those faiths whose political power or popular iconography leads to representation in public buildings, but would exclude faiths which lack political influence or representative physical symbols. The establishment clause prohibits such governmental endorsement of one or more religions. *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947).

Finally, Chabad's position conflicts with its continued insistence that the Chanukah Menorah is not a religious symbol. The court of appeals recognized that a Chanukah Menorah generally is perceived to be a religious symbol, and properly refused to engage in a study of the fine points of Jewish law which Chabad advanced in support of the proposition that the Menorah is without religious significance:

> Further, we cannot believe that the general public would be aware of the religious fine point made by Chabad and thus view that display of a menorah as a lesser endorsement of religion than that of a Torah scroll or other object regarded as sacred. In any event regardless of the lack of religious significance of a menorah its sectarian character is clear and thus even though it may not be regarded as a sacred object its placement was an endorsement of religion.

842 F.2d at 662.

The simple reality that Chabad wishes to display the Chanukah Menorah during the Jewish holiday of Chanukah and to conduct public candlelighting ceremonies which include religious blessings demonstrates beyond any doubt the significance of the Menorah as a religious symbol. Moreover, unlike various symbols associated with the Christmas season, it cannot be argued that the Chanukah Menorah possesses a separate cultural or secular significance. The constitutional test looks solely at the effect of the objective perception of the Menorah. *Lynch*, 465 U.S. at 689 (O'Connor, J., concur-

ring). To the objective observer, the Menorah communicates a religious message. (J.A. 140.)

Our nation's spirit of religious liberty flourishes when groups and individuals engage in the unfettered practice of their religious beliefs. The freedom to worship according to the dictates of one's conscience is diminished, however, when the state grants a preferred position to any one faith. As Justices Goldberg and Harlan observed in *Abington:*

> The fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief.

374 U.S. at 305 (Goldberg, J., concurring). Religious symbols on property which represents the state detract from the fullest realization of religious liberty. True religious equality cannot tolerate a Nativity Scene and a Chanukah Menorah dominating structures of government power.

CONCLUSION

For the reasons stated herein, Respondent Malik Tunador respectfully urges that the decision of the court of appeals be affirmed.

Respectfully submitted,

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Nos. 87-2050, 88-90 and 88-96

In the Supreme Court of the United States

October Term, 1988

COUNTY OF ALLEGHENY, et al.

Petitioners,

vs.

AMERICAN CIVIL LIBERTIES UNION, et al.

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Brief of Respondents American Civil Liberties Union, et al.

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QUESTIONS PRESENTED

1. Whether the Third Circuit correctly held that the Establishment Clause prohibits Allegheny County from displaying a nativity scene, composed entirely of religious symbols, on the central staircase within its Courthouse which contains its core governmental offices and its civil and criminal courts?

2. Whether the Third Circuit correctly held that the Establishment Clause prohibits the City of Pittsburgh from displaying a Chanukah menorah on the face of the City-County Building housing its core governmental offices, state civil trial courts, and the Pennsylvania Supreme Court.

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In the Supreme Court of the United States

October Term, 1988

Nos. 87-2050, 88-90 and 88-96

COUNTY OF ALLEGHENY, et al.

Petitioners,

vs.

AMERICAN CIVIL LIBERTIES UNION, et al.

Respondents

ON WRIT OF CERTIORARI TO THE
UNITED COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENTS AMERICAN CIVIL LIBERTIES UNION, et al.

COUNTERSTATEMENT OF THE CASE

The factual context of these consolidated cases is relatively straightforward. It is also critical to resolving the legal issues presented to this Court. Before reciting those facts in detail, therefore, it is useful to identify and correct some of the principal omissions and inaccuracies contained in Petitioners' briefs.

1. The religious symbols in this case were displayed in public buildings housing core government functions that can and often do command the attendance of certain citizens by compulsion of law (J.A. 17, 18, 121-122).[1]

2. The grand staircase on which the County displayed the nativity scene, referred to by the County as the gallery/forum area, is neither a gallery nor a forum. The staircase is just what its name ordinarily implies (J.A. 190).

3. The statement that the first floor of the Courthouse is used throughout the year for art displays and other civic and cultural events and programs (Solicitor General's Brief at 3)[2] is untrue. The art displays are in a gallery area adjacent to the grand staircase (J.A. 163, 199).

4. The nativity scene, described by the County as "a manger set" (D. Ex. I; J.E.V. 36, J.A. 172, 174),[3] is not part of some larger display nor is it in any way connected with

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[1]The abbreviation "J.A." used throughout refers to the Joint Appendix volume.

[2]S.G. hereafter designates the Solicitor General.

[3]In accordance with Supreme Court Rule 34.5 the initial citation to an exhibit indicates the page in the Joint Exhibit volume where the exhibit is reproduced and the pages in the Joint Appendix where the exhibit was offered and received. Subsequent references contain only a reference to the page in the Joint Exhibit volume at which the exhibit is reproduced.

The abbreviation "J.E.V." refers to the Joint Exhibit volume.

(Continued on next page)

the art display in the adjacent separate gallery (J.A. 197, 199, 200, D. Ex. F, G, J.E.V. 32, 33, J.A. 171, 174).

5. The nativity scene stands alone, framed only by poinsettias and greens, and has no relation to the unseen other decorations in unnamed and unidentified offices (J.A. 167, 188; P. Ex. 3-13; J.E.V. 3-8, J.A. 101, 127).

6. The City of Pittsburgh display consisted of the menorah, a Christmas tree and a sign which said:

SALUTE TO LIBERTY

DURING THIS HOLIDAY SEASON, THE CITY OF PITTSBURGH SALUTES LIBERTY. LET THESE FESTIVE LIGHTS REMIND US THAT WE ARE THE KEEPERS OF THE FLAME OF LIBERTY AND OUR LEGACY OF FREEDOM.

The sign was erected under the tree in 1986 after Respondents' letter of complaint (J.A. 219-220, P. Ex. 1; J.E.V. 1, J.A. 89).

7. There is no question that each of the challenged displays in this case is government sponsored (Menorah: City Brief at 3; Creche: County Brief at i, 2-3).

8. Contrary to the impression conveyed by the Solicitor General's "Question Presented", there was no *joint* display of the County and the City nor was there any display which included both a creche and a menorah. Rather, this action challenges the conduct of two distinct

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(Continued)

The abbreviations "P. Ex.", "D. Ex." and "Int. Ex." refer respectively to Plaintiffs' exhibit, Defendant Allegheny County's exhibit and Intervenor Chabad's exhibit.

governmental bodies for maintaining two discrete and separate displays (J.A. 62; Nativity Scene: J.A. 178-179; Menorah: J.A. 195).

1. The Nativity Scene/The County of Allegheny

Since 1981, the County of Allegheny has displayed a nativity scene, or "creche", during the Christmas season. It is displayed in an altar-like setting framed with poinsettias on the main landing of the grand staircase of the Allegheny County Courthouse (J.A. 124, 161, 164, P. Ex. 3-13; J.E.V. 3-8). The nativity scene is approximately 5 by 3 feet (9 feet including its surrounding fence), stands alone and occupies one-half or more of the grand staircase (J.A. 72, 92, 135, 164, 186). In accordance with Christian religious teachings it contains a series of figures kneeling in adoration of Mary, Joseph and the infant Jesus. The figures vary in height from 3-15 inches and are topped by an angel bearing a banner with the words from the Gospel of Luke "Gloria in Excelsis Deo" (Glory to God in the Highest) *Luke 2:14* (J.A. 74-77, P. Ex. 3-6; J.E.V. 3-4).

Father Gregory Swiderski and plaintiff Ellen Doyle, both Catholics, testified that the creche scene is indistinguishable from those commonly displayed in the Catholic church (J.A. 74-75, 93, 98). Despite the district court's suggestion that the creche merely contributes as part of an overall Christmas scene, nothing within or surrounding the creche scene reflects the non-religious aspects of the national Christmas holiday (J.A. 78).

The Allegheny County Courthouse houses the principal offices of the County—including those of the County Commissioners, the Treasurer and Controller—as well as criminal and civil courts of Allegheny County (J.A. 69). The prominent placement of the creche at the grand staircase landing assures its exposure to visitors to these offices

(J.A. 92, 123-124, 157, P. Ex. 11, 12; J.E.V. 7-8). Many such visitors must use the Courthouse under compulsion of law and thus be exposed to the creche.

The implication by Petitioner Allegheny County that the grand staircase is used "throughout the year" for art displays and other civic and cultural events and programs (County Brief at 4) is clearly misleading.[4] The County's use of the phrase "gallery/forum" does not accurately reflect the true nature of the staircase in question. In the area adjacent to the grand staircase, there is a portion of the Courthouse, referred to by the district court, used for selected art displays, but no claim has been made that the art display set up during November and December of 1986 or in previous years was in any way related to the creche or to the Christmas season (J.A. 197, 201-203).

The gratuitous reference by the County to the wreaths, trees and Santa Clauses displayed by various departments and offices throughout the Courthouse (County Brief at 3-4) is similarly misleading if meant to imply that such decorations within certain offices are somehow connected with the County's display of the nativity scene. One need only reference the photographic reproductions of the nativity scene (P. Ex. 3-13; J.E.V. 3-8) to see that in fact there is but one subject of the display, a free-standing nativity scene framed by potted poinsettias and greens.

Among those who come to the Courthouse under legal compulsion are criminal defendants, subpoenaed trial witnesses and citizens called to jury service (J.A. 21). Others

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[4]While there was testimony by one witness who recalled a sculpture's having been placed on the staircase sometime in the past (J.A. 190), the respresentative of the Cultural Affairs Department responsible for the gallery and for art displays in the Courthouse testified that she had never seen any sculpture on the stairway during her ten months' employment (J.A. 203).

who must come include persons paying county taxes, judges, lawyers trying cases, civil litigants, persons desiring to search certain court records, and those with business at the Sheriff's office (J.A. 69). Additionally, anyone whose business requires he visit the County Commissioners or the County Controller or Treasurer would follow the route leading to the creche (J.A. 96). Indeed, the nativity scene lies between the official signs designating those governmental offices (P. Ex. 11-12, J.E.V. 7-8).

The timing and erection of the nativity scene is coordinated by George N. Thomas, a County employee who discusses and schedules the timing with Father Paul Yurko, a Catholic priest and active member of the Catholic Holy Name Society. Father Yurko comes to the Courthouse as directed by the County and personally places the figures which are stored during the year by the County in the Courthouse and brought from storage to him each year (J.A. 164-166, 178-179).[5] After Father Yurko has arranged the figures, the scene is framed with poinsettias purchased and paid for by the County of Allegheny (J.A. 204).

Although the district court found that the display had a secular purpose, no testimony contradicts that of Father Swiderski and Reverend Robert Brashear, who testified that the Courthouse nativity scene is a religious symbol with no secular purpose (J.A. 78, 136). Its effect on Howard Elbling, a Jewish law clerk whose judge's chambers are within the Courthouse and who used the steps and passed

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[5]A sign beneath the creche reads: "This Display Donated by the Holy Name Society" (P. Ex. 7; J.E.V. 5). The wording of the sign has led to some ambiguity in the record as to ownership of the creche. At least one witness testified that it had been given to the County as a gift (J.A. 126). The Third Circuit, by contrast, assumed that the creche remained the property of the Holy Name Society. *American Civil Liberties Union v. County of Allegheny*, 842 F.2d 655, 657 (3d Cir. 1988).

the nativity scene four to six times a day, was expressed as follows:

> It evoked in me a feeling that I was part of a minority . . . a memory of middle ages time when my people were persecuted and forced to live in guettos (sic) (J.A. 125).

The nativity scene is displayed throughout the Christmas season, which in 1986-7 lasted from November 26 to January 9 (J.A. 179). For about half of that six-week period, during lunch time, musical groups stand before the nativity scene and sing Christmas carols and other songs. On one occasion, the creche was used as an altar for the placement of photographs of soldiers missing in action and the conduct of prayer authorized by the County employee charged with responsibility for the erection and maintenance of the creche (J.A. 188-190).

Respondents, the Pittsburgh Chapter of the American Civil Liberties Union, several lawyers whose work takes them to the Courthouse, a Unitarian minister, and a Moslem whose religion views tangible depictions of the deity as a profanity, sought to enjoin the County from erecting, maintaining and storing the nativity scene and, in a parallel suit, to similarly enjoin the City with respect to the menorah.

2. The Chanukah Menorah/City of Pittsburgh

Within the County of Allegheny, the City of Pittsburgh constitutes a municipal government (J.A. 15). The seat of that government is found at the City-County Building (J.A. 17), one block from the County Courthouse. Although the building bears the name of both governmental units, the area devoted to the display in question is maintained solely by the City of Pittsburgh (J.A. 195). All parties agree that the City and County do not join in any

sort of joint display for the Christmas or Chanukah holidays[6] (J.A. 195, County Brief at 4-5, City Brief at 3).

For a number of years during the Christmas season, the City of Pittsburgh has maintained a 45 foot Christmas tree atop a 20 by 20 foot platform on the front steps of the main entrance of the City-County Building (J.A. 206). No suit has ever been brought to challenge the propriety of the City's erection of the that tree and the present action did *not* raise that issue (J.A. 205).

Intervenor Chabad represents a small percentage of the Jewish population that follows the dictates and pronouncements of their spiritual leader, the Lubavitch Rebbe, whose declarations they believe will hasten the coming of the Messiah (J.A. 249, 252, 257). Of a total Jewish population in the Pittsburgh area of 45,000, only 100-150 families follow this form of extreme orthodoxy (J.A. 247, 251). Approximately five years ago, Chabad members undertook a program to implement a proclamation of the Rebbe exhorting them to participate in a worldwide effort to have public lightings of the Chanukah menorah (J.A. 264-266, 277).[7] In carrying out the Lubavitch Rebbe's dictates, his followers arranged with the City of Pittsburgh that it erect a large menorah (approximately 18 feet high) on the face of the arch of the main entrance to the City-County Building (J.A. 206, 290-291). The menorah, which is maintained, stored and erected by City

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[6]The "question presented" by the Amicus brief of the Solicitor General does not correctly relate to the facts of this case.

[7]Lubavitch is engaged in a "war against the forces of assimilation, helping Jews around the world to rediscover the eternal truths of Torah Judaism" (P. Ex. 18; J.E.V. 20, J.A. 285). In its Amicus brief, the American Jewish Congress gives some history of the Lubavitch movement at pp. 18, 19 n.29 and its message of proselytization is set forth in part in Plaintiff Ex. 18 reciting its mission to . . . "light up the souls of Jews . . ." (J.E.V. 19).

employees, is placed to the side of the Christmas tree (J.A. 290, 291; P. Ex. 14; J.E.V. 9, J.A. 217; Int. Ex. 1; J.E.V. 40, J.A. 213).

The City-County Building performs for the City the functions of the Allegheny County Courthouse (J.A. 114). It houses not only the offices and chambers of the Mayor and the City Council but also those of the City Treasurer, the Allegheny County Prothonotary (Clerk of Courts), the principal county civil trial courts, the marriage license bureau, the Register of Wills, and the Pennsylvania Supreme and Superior Courts (J.A. 17-18, 99).

The menorah at the City-County Building is identical to three others Chabad erects in Pittsburgh at other locations (J.A. 279-281). It has been lighted by faithful Lubavitch adherents, including its principal Pittsburgh Rabbi, who accompanied his lighting with the recitation, in Hebrew, of the religious blessing (J.A. 271-272). Rabbi Mark Staitman testified that the Chanukah menorah is clearly a religious symbol and Chabad's witness, Rabbi Yisroel Rosenfeld, acknowledged that the menorah "makes public the miracle" God performed for the Jewish people[8] (J.A. 139-141, 146, 229, 262-263). The district court acknowledged that Chabad advocates such displays to "symbolize the lighting of the souls of the Jewish people . . . " (City Cert. Pet. at 42a), and suggested that the lighting permits Jewish families to participate in the holiday lighting. *Id.* It also recognized that the Chanukah menorah may call attention to the fact that Jews also have a "miracle" to remember. *Id.* Although the Chanukah

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[8]The Jewish holiday of Chanukah commemorates the rededication of the holy Temple in Jerusalem, the miracle of God's intervention on behalf of the Jews in the Maccabean war that resulted in their victory over their enemies and the miracle that oil for the Temple's religious Menorah sufficient for burning only one day lasted instead for eight (J.A. 138-139, 141-143, 263-246).

menorah has eight as opposed to the customary seven branches of the Temple menorah, it is quite similar in shape to and easily mistaken for its more common seven branch counterpart (J.A. 139, 144, 262).

The Third Circuit reversed the district court's denial of injunctive relief. It held that in placing this creche and this menorah in and at public buildings devoted to core functions of government, both the City and the County had acted to advance religion, thus violating the Establishment Clause.

SUMMARY OF ARGUMENT

The Establishment Clause prohibits government from engaging in certain types of religious speech whether that speech is written, spoken, or by symbolic display. The County of Allegheny and the City of Pittsburgh each violated this prohibition by displaying symbols perceived as clearly religious at buildings which house their core functions of government. The Establishment Clause violation was compounded by virtue of the fact that each building is one to which some of their citizens are brought involuntarily under compulsion of law.

1. In *Lynch v. Donnelly*, 465 U.S. 668 (1984), this Court specifically rejected a *per se* endorsement of Christmas nativity scenes and, by analogy, of other religious displays. Instead, *Lynch* applied the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and stressed the importance of context in determining whether a particular religious display has the impermissible effect of advancing religion.

Each of the contextual factors cited in support of the decision in *Lynch* is absent here. Most significantly, the displays in this case are purely religious and undiluted. As a result, the placement of the nativity scene on the grand

staircase of the Courthouse and of the menorah on the face of the City-County Building unmistakably and impermissibly place the imprimatur of government on discrete religious messages.

2. Under the endorsement analysis articulated by Justice O'Connor in her concurrence in *Lynch*, the nativity scene and menorah clearly carry the messages to outsiders (and insiders) that trigger the prohibition on the government's display of religious symbols. The nativity scene, with its intense religiosity, set between signs indicating the principal offices of government, sends a message to outsiders that they are not full members of the political community. The menorah at Pittsburgh's "city hall" sends a proselytizing message to "light up the souls" of the Jewish people and is perceived in that manner by members of the community.

Even were one to accept Chabad's position that the Christmas tree adjacent to the menorah sends a countervailing religious message, the decision below is plainly correct. The government hardly satisfies its Establishment Clause obligations by broadcasting two religious messages rather than one. In either event, the message conveyed to all non-Christians and non-Jews in the Pittsburgh community is that they are outsiders simply because of their religious beliefs.

3. Petitioners' argument that these purely religious displays are somehow secularized by the "context" of Christmas clearly proves too much. Taken at face value, it would permit a state to hold a Christmas eve Mass in its courtrooms. Nothing in *Lynch* supports that extraordinary result.

4. Chabad's argument that the principal of neutrality embodied in *Larson v. Valente*, 456 U.S. 228 (1982), necessitates the erection of a menorah alongside the City's Christmas tree rests on the premise that the tree itself is a Christian religious symbol. Since this argument was not advanced in the district court, respondents submit it has not been preserved for appeal. Even were one to accept that premise, however, the cure for the government's displaying a Christian symbol cannot be the "remedy" that Chabad suggests. To say that neutrality condemns, much less demands, placement of a Jewish symbol next to a Christian symbol is to totally ignore the diverse religious population among Pittsburgh citizenry. Thus, such a "solution", would hopelessly entangle government in a rivalry in which it inevitably would serve as the judge of which groups qualified as religions, which symbol properly represented each group, where placement of each and all symbols could be made to achieve neutrality, and how it could fairly and neutrally treat those religions (and non-religions) who decry any symbol.

5. In response to those who suggest a basis in history for the government's display of religious symbols here, we urge that neither display falls within the scope of any of the historical acknowledgements that have been made, nor within appropriate areas of permissible accommodation of religion. The cases which have permitted that degree of accommodation are radically different from these gratuitous government pronouncements.

6. Finally, although respondents submit that there is no real issue of a public forum since the sites used for the menorah and the creche were never made generally available for expressive activity, the 24 hour round-the-clock displays of religious symbols over a six-week period by the County of Allegheny and the City of Pittsburgh are not

justified under any application of the public forum doctrine.

ARGUMENT

I. THE DECISION BELOW CORRECTLY APPLIED *LYNCH*

A. The Majority Opinion in *Lynch* Emphasized that the "Effect" of a Religious Display Inevitably Turns on its Context.

In *Lynch*, this Court carefully avoided the sort of *per se* endorsement of nativity scenes that Petitioners and the Solicitor General now urge as the doctrine of that case. To accept their view requires rejecting former Chief Justice Burger's specific statement that "in each case, the inquiry calls for line-drawing; no fixed, *per se* rule can be framed." *Lynch*, 465 U.S. at 678. Rather than set the bright line rule posited by Petitioners, this Court, in *Lynch*, carefully stressed the fact-bound nature of its constitutional inquiry.

In *Lynch*, this Court identified a number of salient facts, none of which is present in this case. First, the Pawtucket creche was surrounded by secular symbols of the Christmas holiday season. Second, the secular message of the display was reinforced by its placement in the heart of the city's shopping district. Third, the creche was displayed in a park that was privately owned. Fourth, neither the storage nor the erection of the creche in *Lynch* involved any entanglement between government and religion.

Each of those critical factors is absent in this case. In contrast to the Pawtucket creche, the creche in this case is a purely religious symbol undiluted by any accompanying secular images. There is no Santa Claus, no reindeer or sleigh, no elves, no wooden carolers, no wishing well or teddy bear. Rather, the creche stands serene, framed by

poinsettias and greens, similar to those creches traditionally found in Catholic churches (J.A. 72-78, 98). Second, unlike Pawtucket, Allegheny County did not place its creche in a privately owned park in the heart of the city's shopping district. Instead, it located the creche in the seat of County government between signs designating the principal County offices and in the building housing its criminal and some civil courts.[9] Indeed, the fact that many citizens of Allegheny County are required to be present in the Courthouse—either by virtue of their jobs or by direct government compulsion in the form of a subpoena—makes this case analytically closer to school prayer cases with their requirement of compulsory attendance than to the Pawtucket creche case. *School District of Abington Township v. Schemmp*, 374 U.S. 203 (1963); *Illinois ex. rel McCollum v. Board of Education*, 333 U.S. 203 (1948). Third, Allegheny County was not content here to have its own employees erect the nativity scene each Christmas season. Instead, it followed a course of entanglement by effectively retaining a Roman Catholic priest to serve as its consultant on both the timing and content of the display (J.A. 164-165, 178-180).

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[9]Not only was the creche placed in the building's most beautiful location (J.A. 157), it was located on the same floor and between signs for the government's key leadership, including the Board of Commissioners, Sheriff, Treasurer, Controller, and Court Clerk (P. Ex. 11-12, J.E.V. 7-8). The setting, in short, was replete with government's presence. Using "'an unequivocal Christian symbol,' 827 F.2d at 127, so that its placement in this 'unique physical context' communicated a message of government endorsement . . . [which] '*unmistakably suggests* [the] *alliance*'" between church and state. *County of Allegheny*, 842 F.2d at 660, 661 (emphasis added) adopting the language of *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 127, 128. (7th Cir. 1987).

All of these distinctions were properly emphasized by the Court of Appeals which concluded, based on a carefully elaborated six part test derived from *Lynch*,[10] that the effect of *this* creche in *this* setting was to promote religion—indeed to promote a specific religion—in violation of the Establishment Clause. Other Courts of Appeal have applied a similar analysis and reached a similar result in the years since *Lynch*. *American Civil Liberties Union v. City of Birmingham*, 791 F.2d 1561 (6th Cir.), *cert. denied*, 479 U.S. 939 (1986); *American Jewish Congress v. City of Chicago, supra*.

1. *The County's and Solicitor General's Argument in Support of the Creche Cannot be Reconciled With the Holding in Lynch.*

Petitioner Allegheny County and the Solicitor General suggest that the approach followed below trivializes *Lynch* and transforms constitutional decision making into a banal exercise of counting reindeer. It is an argument that rests on the classic confusion between the forest and the trees. The secular images described in *Lynch* are not significant by themselves; they are only significant because they establish the *context* in which the inherently religious symbol—whether creche or menorah[11]—will be perceived and understood by the general public. In a secularized setting, even religious symbols can be perceived and understood in

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[10]The six factors include (1) the location of the display; (2) whether the display is part of a larger configuration including nonreligious items; (3) the religious intensity of the display; (4) whether the display is shown in connection with a general secular holiday; (5) the degree of public participation in the ownership and maintenance of the display; and (6) the existence of disclaimers of public sponsorship of the display. *County of Allegheny*, 842 F.2d at 662.

[11]For a detailed discussion of the history and meaning of the creche and menorah, see Amicus Brief of the American Jewish Congress pp. 20-22.

secular terms. Removed from their secular setting, the unmistakable impression conveyed by such religious symbols is one of government endorsement for their religious message. This case highlights the importance of that distinction. In *Lynch*, the nativity scene was part of a holiday setting that included both candy canes and Santa's sleigh and reindeer. Indeed, from one vantage point, the reindeer appeared to arc over the creche itself. Comparing the park display in *Lynch* (D. Ex. B, C-1 through C-7, D. *Lynch* Jt. App. pp. 170 through 178) however, with the intensely religious display here (P. Ex. 3-10, J.E.V. 3-7) reveals the disingenuousness of the implicit suggestion that the effect in both displays is the same.

The Solicitor General also suggests that shifting 300 feet from a park to a public building cannot change a legitimate display to one which is prohibited (S.G. Brief at 15). Yet the teaching of *Lynch* is that context is not only important, but critical. To suggest that changes in setting have no impact on the message carried by a display is simply to shut ones eyes to matters of common experience. If "messages" remain the same irrespective of their settings, today's advertisers waste a great deal of money looking for appropriate backdrops for photographs and stage set designers get paid for no reason. Indeed, if one accepts the Solicitor General's argument that the locale of the display makes no difference, then, since the creche here is substantially identical to one found in the Catholic Church, how does moving it from the church setting to the grand staircase of the Allegheny County Courthouse change its religious message?

What the Petitioners and the Solicitor General suggest is that the members of this Court not believe their own eyes. To recognize, as have the Courts of the Third, Sixth and Seventh Circuits, that "the presence of government

in . . . City Hall is unavoidable", *County of Allegheny*, 842 F.2d at 660, quoting *City of Chicago*, 827 F.2d at 128, and that a display of undiluted religiosity within "City Hall" sends a religious message from government, is merely to acknowledge the validity of one's own senses. Petitioners urge, however, that Christmas is different from the rest of the year and that the entire season has become so secularized that any display associated with Christmas is, by definition, non-religious in nature. The flaws in this approach are obvious, both logically and legally. Perhaps most fundamentally, it lacks any limiting principle. If accepted, it would presumably mean that the County could hang a crucifix in its courtrooms during the Christmas season or conduct a daily Mass in the lobby that now houses the creche. Nothing in the Court's Establishment Clause jurisprudence even remotely suggests that such religious behavior on the part of the state would be constitutional.

Second, Petitioners' argument overlooks the critical fact that certain occasions, including Christmas, have both secular and sacred components. The holding of *Lynch* is simply that government may celebrate the secular aspects of Christmas without violating the Establishment Clause. *Lynch* does not hold that government may engage in any religious exercise or display any religious symbol merely because it is Christmas. For similar reasons, the City's and Solicitor General's reliance on *McGowan v. Maryland*, 366 U.S. 420 (1961) is plainly incorrect. The *McGowan* Court upheld the Sunday closing laws because it found that, whatever the religious origins of such laws, they now served the secular function of providing communities with a commonly acknowledged day of rest. *McGowan* does not hold that the state can further that secular purpose by holding an officially sponsored religious service every Sunday. Yet that, in effect, is what Petitioners are seeking here.

The Solicitor General's brief suggests that, somehow because the nativity scene and the menorah are what it terms "passive" symbols that do not coerce the belief or compel the obedience of visitors, that exempts government's speech from the Establishment Clause's prohibitions (S.G. Brief at 8, 22 n.14). Such an "exemption" is not based on this Court's jurisprudence nor should the Court adopt it now. It is one thing to say that government violates the Establishment Clause when it coerces or compels. *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943). It is quite another to suggest that *because* government is *not* so coercing, it is then free to speak religious doctrine. If that were the test, there would be no prohibition against a government sign at the Courthouse which pronounced, "Put Christ back in Christmas," so long as citizens were not required to respond "I agree," or a crucifix above the chambers of this Court so long as entrants were not required to genuflect.

2. *The Arguments Advanced In Support of the Menorah Are Inconsistent With Those Advanced In Support of the Creche and Equally Inconsistent With the Establishment Clause.*

While the City of Pittsburgh and Chabad urge approval of the menorah display under *Lynch*, their arguments rest on a reference to context that the County rejects as constitutionally irrelevant. Thus, the City urges that the menorah display is permissible *because* it is accompanied by other holiday objects. In that sense, precisely what the City does is "count reindeer" (City Brief at 12 n.3) and embrace the "St. Nicholas too" test derided by the dissent in *Birmingham*, 791 F.2d at 1569. Thus the City goes to lengths to say it includes signs advertising flower displays and a fund drive in order to embellish its display. Indeed the City likens its advertising signs and tree to *Lynch's*

Santa Claus house, reindeer and candy striped poles, in urging that the displays are "very similar" (City Brief at 12 n.3). To that extent, acceptance of the City's position necessitates rejection of the contrary position of the County and of the Solicitor General.

The City alternately argues, as does Chabad, that its display passes muster under each of the three *Lemon* prongs. It appears to concur with Chabad that placement of the menorah next to a Christmas tree negates any message of government endorsement. Only Chabad's assertion, of course, results from its insistence that the Christmas tree is a Christian symbol which by its very presence assertedly negates endorsement of Judaism. With a startling insensitivity to other religions, neither the City nor Chabad deals with the permissibility of endorsement of Judeo-Christian religions to the exclusion of others.

Chabad's position as to the menorah has two premises which appear to be mutually inconsistent. For its alternate *Larson* argument (discussed *infra* in Section III), Chabad urges that the religious message of Judaism *must* be sent by the menorah so long as the religious message of Christianity is being broadcast by the tree. In its *Lemon* analysis, however, Chabad asserts that the menorah is not a religious symbol and thus presumably sends no religious message. Drawing upon the *Lynch* dissenters' descriptions of the Pawtucket nativity scene, Petitioner Chabad attempts to carve out from *Lemon* a new "exception", that is, that if a government display does not utilize a "sacred object" it is somehow exempt from Establishment Clause prohibitions. The dissent in *Lynch* affords no basis for this argument. While it is true that Justice Brennan recited the nativity scene's meaning as deeply religious, (456 U.S. at 708), and that Justices Blackmun and Stevens decried the misuse of a "sacred symbol" as a "neutral harbinger of the

holiday season . . ." (465 U.S. at 727), in describing why government should be *prohibited* from displaying that sacred religious symbol, a reverse syllogism hardly follows. Thus, Chabad's premise that government should be *permitted* to display non-sacred but undeniably religious objects is founded neither in logic nor in precedent. To the average Pittsburgh citizen, the message conveyed by the City's display comes not from the Talmud but from every day experience. The Court of Appeals, in rejecting Chabad's argument thus, stated:

> [W]e cannot believe that the general public would be aware of the religious fine point made by Chabad and thus view the display of the menorah as a lesser endorsement of religion than that of a Torah scroll or other object regarded as sacred. In any event regardless of the lack of religious significance of a menorah its sectarian character is clear and thus even though it may not be regarded as a sacred object its placement was an endorsement of religion.

County of Allegheny, 842 F.2d at 662.

Respondents readily agree that the case-by-case analysis contemplated by *Lynch* lacks a certain precision. But, the necessity for balancing is hardly unique to the constitutional rule announced by the Court in *Lynch*. Obviously, a rule permitting any religious display during the Christmas season would be clear and easy to apply.[12] But it would not be consistent with the basic premises of the Establishment Clause nor would it solve the next case down the road inevitably involving religious symbols during some other

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[12]Although to suggest the Establishment Clause takes a December holiday illustrates the frivolity of that "construction".

holiday season. To the contrary, it would invite a discordant competitive jousting among religions and sects for advantages of government recognition and approval.

B. The Religious Displays in This Case Also Violate the Purpose and Entanglement Prongs.

Although the Court of Appeals did not reach the first or third prong of *Lemon*, all Petitioners argue that no violation can be grounded in non-secular purpose or entanglement. In fact, this case involves both elements of entanglement that Chief Justice Burger found missing in *Lynch*: a fusion of the roles of government and religious authorities and the risk of sectarian divisiveness.[13]

For the County, its interactions with the Holy Name Society[14] every year have become institutionalized (J.A.

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[13]The circumstances of this case also raise serious questions about the governments' allegedly secular purposes. The secular goals identified in *Lynch* are surely attenuated when, as here, the County chooses to put up a purely religious display. The City's purpose in erecting the menorah is equally suspect. It is undisputed that Chabad's request to place a menorah in front of the Pittsburgh City-County Building was prompted by a call from Chabad's spiritual leader to light the menorah publicly as part of a "war against the forces of assimilation, helping Jews around the world to rediscover the eternal truths of Torah Judaism" (P. Ex. 18, J.E.V. 20). The Establishment Clause surely means government may not lend its support to a religion's search for additional adherents. Nor, on this record, should the state be permitted, without any test or screening, to absolve itself of *religious* purpose by claiming it acts merely as a passive conduit. Moreover, the Mayor's letter referencing his concern only for "Jews and Christians" seems clearly to exclude other religions and non-religions (P. Ex. 2, J.E.V. 2, J.A. 90).

[14]Father Swiderski testified that "[t]he Holy Name Society is a national organization of Catholic men established to promote the veneration for the name of Jesus . . ." (J.A. 73). The Society was founded in the thirteenth century "to exhort the faithful to increased reverence for the name of the Redeemer, and thus to make reparation for and to counteract the prevalent profanity and blasphemy," an undertaking it

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73-74). Unlike the city in *Lynch*, the County defers entirely to Father Yurko in putting up the nativity scene. This is a delicate function since, as shown above, the content and design of the display necessarily affect its legality. Yet the County totally relinquishes this public function to Father Yurko who insists on doing "everything himself" (J.A. 165),[15] and whose dedicated purpose is in increasing veneration for Jesus Christ. Not surprisingly, the clergyman did not place the creche figurines among sleighs, toys and Santas, put up multiple strong disclaimers, or move the items to a more neutral site—concerns that a government must take into consideration. For precisely this reason, this Court has consistently condemned such ongoing relationships between government and religion, *e.g. Aguilar v. Felton*, 473 U.S. 402 (1985), particularly with pervasively sectarian groups, *e.g., Roemer v. Board of Public Works*, 426 U.S. 736 (1976).

Allowing Father Yurko complete control over the display also implicates the entanglement doctrine which prohibits vesting government powers in religious bodies. *Larkin v. Grendel's Den*, 459 U.S. 116 (1982); *School District of the City of Grand Rapids v. Ball*, 403 U.S. 373 (1985). Significantly, the entanglement shows signs of increasing. County funds now pay for the poinsettia frame which its employees place (J.A. 204).[16] Additionally, community exposure shows evidence of growth. No longer

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continues to perform. It promotes "public manifestation of respect for Christ's name . . ." 7 *New Catholic Encyclopedia*, 79 (1967).

[15]This was contrary to the practice approved by the Court in *Board of Education of Central School District No. 1 v. Allen*, 392 U.S. 236, 244-245 (1968) where the decisive factor was that public rather than religious authorities were making ultimate curriculum choices.

[16]George Thomas who was in charge of the display testified that he knew of no out of pocket expenses (J.A. 166). This misimpression

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simply a carolling site, it is an orientation point for school children on tours of the courts (J.A. 95) (P. Ex. 8, J.E.V. 6, J.A. 95, 101), and the site for a minister's invocation dealing with the POW's and MIA's (J.A. 160, 190).

The City maintains that its display of the menorah was not entangling because there is no evidence that the display "engenders political divisiveness or a potential of political divisiveness." (City Brief at 16-17). Chabad agrees that "since no subsidies are involved, there is no possibility much less likelihood of political pressure to increase benefits for one faith at the cost of another, or to benefit religion generally at the expense of atheists or others who are non-religious." (Chabad Brief at 14). In examining religious symbols this Court has never suggested that benefit to religion is measured solely in terms of an accountant's balance sheet. See, e.g. *Stone v. Graham*, 449 U.S. 39 (1980).

Furthermore, the disagreement among members of the Jewish religion as to the issues here will inevitably lead to government entanglement. While Chabad's witness, Rabbi Rosenfeld, testified in favor of the menorah display, (J.A. 225-306), Rabbi Staitman testified in opposition (J.A. 136-148). Likewise, while Chabad/Lubavitch approves the display, the Anti-Defamation League represents a party who objects. This Court stated its intent to stay out of such sectarian debates in *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. at 716 (1981). Similarly, many Jewish groups strongly disagree with

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regarding the allocation of funds by the person normally in charge reflects questionable practice since government "aid [to religion] must be supervised to ensure no entanglement." *Aguilar*, 473 U.S. at 421 (Rehnquist, J. dissenting).

Chabad's characterization of the menorah. This Court cannot and should not be in the position of resolving theological disputes over what is or is not a religious object. *Cf. Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94 (1952).

II. THE COUNTY AND CITY DISPLAYS VIOLATE THE ENDORSEMENT CRITERIA ARTICULATED BY JUSTICE O'CONNOR IN HER CONCURRENCE IN *LYNCH*.

Because Petitioners either confuse or ignore the distinction between the secular and the sectarian that was vital to the majority opinion in *Lynch*, they also misapprehend the essence of the endorsement analysis articulated in Justice O'Connor's concurring opinion. The Pawtucket creche did not represent an endorsement of religion because its content and context did not convey a sectarian message. The content and context of this creche are markedly different and, as the court below found, convey an entirely sectarian message. Indeed, Justice O'Connor's articulation of the endorsement issue was prophetic as to the effect of the displays here.

> Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.

Lynch, 465 U.S. at 688 (O'Connor, J. concurring).

The nature of that message was perhaps best conveyed in this case by Howard M. Elbling, a law clerk for one of the state court judges, who described his feelings as a Jew compelled to walk past the creche several times a day on

his way to and from work. According to Elbling, these repeated viewings,

> . . . evoked in me a feeling that I was part of a minority . . . a memory of middle ages time when my people were persecuted and forced to live in guettos (sic) (J.A. 125).

Respondent Malik Tunador, a Moslem, appeared at the Courthouse to renew his passport (J.A. 109). There, he encountered the creche, a personification of the deity prohibited in the Moslem religion since the deity "is not a tangible being. God is omnipresent everywhere all the time, and the depiction of this concept in a tangible form is completely forbidden in Moslem religion" (J.A. 110).

Respondents' reaction is not unique to Allegheny County. As Dean Redlich has written: "When I see a government-supported creche, I suddenly feel as if I have become a stranger in my home, to be tolerated only as long as I accept the dominant religious values."[17] That message was conveyed with stark clarity by the undiluted religiosity of the Allegheny County creche.

Nor is it an answer to say that the County did not intend to convey a message of religious endorsement. Even assuming that is true for purposes of argument, it only responds to half the problem. As Justice O'Connor observed in *Lynch:*

> If the audience is large, as it always is when government "speaks" by word or deed, some portion of the audience will inevitably receive a message determined by the "objective" content of the statement, and some portion will inevitably receive the intended message. Examination of both the subjective and the objective components

[17] *See* Tribe, American Constitutional Law, at 1293 n.66 (1988).

> of the message communicated by a government action is therefore necessary to determine whether the action carries a forbidden meaning.
>
> The purpose prong of the Lemon test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid. 465 U.S. at 690 (O'Connor, J. concurring).

The County argues that the religious impact of this particular creche was blunted by the presence of a sign noting that the creche had been donated by the Holy Name Society. It is difficult to understand how the reference to an overtly sectarian group blunts the religious message of a creche located within the seat of government. In any event, the Third Circuit found that this single placard neither distanced the County from the creche nor secularized the display. *County of Allegheny*, 842 F.2d at 662.[18]

The Menorah also fails to pass muster within Justice O'Connor's framework for analyzing endorsement. Petitioners, City of Pittsburgh and Chabad, suggest that the menorah's display does not convey a prohibited message. Analysis of their argument reflects its invalidity. Chabad's argument is premised on its unsupported assertion that a Christmas tree is a Christian symbol, thus neutralizing any religious message communicated by the menorah. The message of full religious toleration which Chabad asserts

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[18]One witness understood the sign to mean that the Holy Name Society had made a gift of the creche to the County (J.A. 126). The sign also did not diminish the ecclesiastical impact of the display for some since Holy Name Society signs are similarly found in churches (J.A. 95).

results from the Christmas tree and menorah's standing side by side (Chabad Brief at 17), clearly admits the Jewish religious message "sent" by the menorah. With this Respondents agree. The "full religious toleration" which follows for Chabad, however, presupposes this Court's acceptance of the concept that a Christmas tree is a "Christian symbol." That this argument has not been preserved for appeal is argued *infra* in section III. Should this Court refuse to accept Chabad's premise, then the sole message which is sent is that of approval of the Jewish religion.

Even accepting Chabad's analysis, the City's display fails the endorsement standard since the message is sent to nonadherents of the Jewish or Christian faiths that *they* are "outsiders, not full members of the political community ..." with the accompanying message to Jews and Christians that they are "insiders".[19] *Lynch*, 465 U.S. at 688 (O'Connor, J. concurring).

The district court's opinion emphasized that the menorah conferred special status on the Jews within the community. "It may call to the attention of the public that jews (sic) also have a miracle to remember."[20] (Opinion of Judge McCune, City Cert. Pet. 42a). The *insider* message transmitted is compellingly expressed in the letter of Marlaine Darfler, reprinted in Chabad's publication, Let There Be Light, as to her reaction to a similar menorah display,

> ". . . . there, for all to see, was my symbol, an affirmation of my faith . . . I felt so proud, so recognized."

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[19]The comparative size and placement of the tree and menorah, however, raise serious questions that one is regarded as better or more important than the other.

[20]The Court gave no explanation for its puzzling suggestion that a "miracle" may be secular.

(P. Ex. 18; J.E.V. 24). Thus, the City and district court gave Chabad (and its message) the official recognition it sought.

III. *LARSON v. VALENTE* DOES NOT REQUIRE DISPLAY OF A MENORAH.

A. Petitioner Chabad's Argument.

Petitioner Chabad argues that *Larson v. Valente*, 456 U.S. 228 (1982) requires the City to display its menorah since it displays a Christmas tree (Chabad Brief at 27-30). Building on *Lynch's* rejection of *Larson's* application to the Pawtucket display, the Solicitor General disagrees and asserts that no counter-balancing of a religious holiday display is required by *Larson* (S.G. Brief at 20 n. 13). Neither position is correct.

1. *Chabad's Current Position Has Not Been Preserved For Appeal.*

The position now urged by Chabad was never asserted in the district court. Neither its petition to intervene (J.A. 35) nor its evidence at trial made any reference to its current argument that the Christmas tree is a Christian symbol (J.A. 211-318).[21] It is hardly surprising, therefore, that there is no evidence in this record as to whether other religious denominations have requested representation in

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[21]In the Court of Appeals, not relying on *Larson*, Chabad attempted to assert an argument that Jewish residents have a right to display their symbol if Christian symbols are displayed. The City moved to strike since the issue had not been raised below (see Motion of City of Pittsburgh to Strike Portion of Brief of Intervenor—Appellee, Chabad, Nov. 24, 1987). The Court of Appeals deferred consideration of the City's motion until its consideration of the merits (see Order of Court, December 7, 1987). Although it issued no ruling on the motion, the Court of Appeals did not address Chabad's argument in its opinion.

the City's display.[22] Chabad's recitation that "none" have made such a request (Chabad Brief at 29), is unsupported by citation to the record because there is no such evidence. Under these circumstances, the *Larson* argument made by Chabad is not properly before the Court and should not be considered. "Ordinarily this Court does not decide questions not raised or involved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981). Moreover, given the prohibition that "Congress shall *make no law* . . . ", there appears no justification for the notion that the government *may* act to foster one or two religions until another religion asks for inclusion as well.

2. *If The Tree Is A Christian Symbol Chabad's Solution Compounds The Problem.*

Assuming that Chabad could properly here assert that the Christmas tree is a symbol of Christianity,[23] Chabad's proposed cure (adding a menorah) not only does not solve the problem, it invites its proliferation. Similarly, even if the Solicitor General's brief had correctly stated the "question presented"[24] so that the menorah and creche were together in one display, the Establishment Clause violation persists. The denominational preference for Judeo-Christianity, as opposed to other religions and agnosticism and atheism, that *Larson* denounced would still remain.

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[22]There was a request, not cited by Chabad, that the City and County refrain from erecting religious symbols in their buildings and pointing out "that one religion's symbol is another religion's heresey . . . " (P. Ex. 1, J.E.V. 1, J.A. 89).

[23]Respondents take no position on this issue but note that some court dicta have indicated to the contrary. *American Civil Liberties Union v. City of St. Charles*, 794 F.2d 265, 271 (7th Cir.), *cert. denied*, 479 U.S. 961 (1986); *City of Chicago*, 827 F.2d at 127.

[24]It does not. The assertion that the nativity scene and the menorah are included in *a* display is apparently based on an unfamiliarity with the actual record here.

Moreover, viewing this sort of combination either singly or as part of a package is likely to plunge cities into a vortex of demands and counter-demands from one religion after another.[25] Respondents suggest that if the tree is a Christian symbol, the only solution compatible with the Establishment Clause is to remove it.

B. The Solicitor General's Position That No Counterbalancing Is Required Is Unsupported By Law.

In *Lynch*, 465 U.S. at 687 n.13, former Chief Justice Burger rejected the First Circuit's use of the *Larson* "strict scrutiny" test since the display in that case did not appear to be explicitly discriminatory. Justice O'Connor concurred, noting that the Pawtucket display did not involve an intentional discrimination among religions. *Id.* at 688, n.13. Of course, these observations in *Lynch* must be read in the context of the Court's conclusion that the Pawtucket creche was displayed in a setting that largely denuded it of religious significance. Ignoring this fact, the Solicitor General argues that, since it is not possible to give uniform recognition to all religions in the context of commemorating religious holidays, no counterbalancing is required. No analysis is made of the establishment problems inherent in selecting only certain religions to commemorate. Is there some lesser standard to apply to constitutional prohibitions in December? And if the government may display Christian and Jewish religious symbols in December, must it not similarly display in September the elephant headed

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[25] *Edwards v. Aquillard*, ___ U.S. ___, 107 S.Ct. 2573, 2589 n.6 (1987), notes some 1,347 religious organizations enumerated in the Encyclopedia of American Religions. The Pittsburgh religious community is diverse. In addition to Jews and Christians, it includes, at least, Moslems, Hindus and Unitarians (J.A. 132-133).

god for the Hindu holiday of Ganesh Chaturthi and Buddhas decorated with flowers and monks' robes for the Buddhist holiday of Bodhi Day which in 1988 fell in September? And what of religions that have no symbols?

No Justice disagreed with the assertion in *Larson*, 456 U.S. at 244, that the "clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." Justice O'Connor in her concurrence in *Lynch*, 465 U.S. at 688 n.13, reaffirmed her adherence to the *Larson* standard. In *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) this Court, in striking down a Connecticut statute which gave favored treatment to Sabbath observers, stated: "This unyielding weighting in favor of Sabbath observers over all other interests contravenes a fundamental principle of the Religion clauses. . . ." 472 U.S. at 710.

The Solicitor General summarily dismisses the mandates of *Larson*, simply stating "it is not possible for the government to give uniform recognition to all religions in the context of commemorating a holiday with specific meaning for one or more religions." (S.G. Brief at 20, n.13). That admission is exactly the point. It does not, however, lead to the conclusion that, in such situations, *Larson* should be ignored. Once the Solicitor General's view is accepted, isn't the inexorable result that, since government must maintain neutrality among religions, it should not select *any* for special recognition?

To permit government to display Christian symbols without Jewish symbols, or Christian and Jewish symbols while ignoring other religions, is to foster the most divisive sort of preferential treatment of religion in a pluralistic society.

IV. THE RELIGIOUS DISPLAYS IN THIS CASE CANNOT BE JUSTIFIED AS AN HISTORICAL EXCEPTION TO THE ESTABLISHMENT CLAUSE OR AS A PERMISSIBLE ACCOMMODATION OF RELIGION.

As a fallback position, Petitioners argue that even if the religious displays in this case are in fact sectarian, and even if they in fact convey a message of religious endorsement, they can be upheld as either a permissible accommodation of religion or another benign example of this nation's historic acknowledgement of religion. Neither argument withstands scrutiny.

A. The Religious Displays In This Case Cannot Be Characterized As Merely A Benign Acknowledgement of Religion.

Our opponents' effort to describe the displays of the creche and menorah at issue in this case as a benign acknowledgment of religion—akin to the words "In God We Trust" on the nation's currency (S.G. Brief at 11) is flawed on at least three grounds. First, the practice of erecting religious displays within the core buildings of government has not been validated by history. To the contrary, it is clear that the framers of the First Amendment were deeply suspicious of any effort to coerce religious observance by placing religious symbols in a setting where public attendance is often required and sometimes compelled. Second, both the creche and menorah are inherently denominational in character. Third, the Constitution prohibits even non-preferential support for religion. None of the historically sanctioned exceptions to the principle of church-state separation apply to the facts of this case.

1. *There Is No Historical Practice Of Erecting These Religious Displays In Government Buildings.*

In *Marsh v. Chambers*, 463 U.S. 783 (1983), the Court rejected an Establishment Clause attack on a legislative chaplaincy where it found an unbroken tradition of utilizing such clergy dating to the beginning of our national life. The practice had become a "part of the fabric of our society." *Id.* at 792. No similar claim can be made regarding the placement of nativity scenes within courthouses or the mounting of Jewish menorahs on city halls. Display of these Christian and Jewish symbols is of relatively recent vintage in Pittsburgh, dating respectively from 1981 and 1982. *See, County of Allegheny*, 842 F.2d at 657. Moreover, there is no salient national tradition utilizing the creche in public celebrations of Christmas[26] much less one of posting the Chanukah menorah at the town hall. Because Jews were few[27] in early America and deemed "second class citizens" (T. Curry *The First Freedoms* 90-91 (1986)) such a display would have been unimaginable at the time. Inasmuch as anti-Catholic sentiment was alive in the colonies and in the early American nation[28] a creche in a county courthouse would have been equally astonishing. Even Lord Baltimore who had established Maryland as a haven for Catholics decreed that their acts "be done as privately as may be." Curry, *supra* at 35. In the New England puritanical tradition a public celebration of Christmas would have been a sacrilege. *Lynch*, 465 U.S. at

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[26]*See Lynch*, 465 U.S. at 694 (Brennan J. dissenting).

[27]There were approximately 2,000 Jews in America in 1776. 2 Encyclopedia Judaica 1810 (1976).

[28]See Curry at 80. Catholics were feared as a fifth column in the French and Indian wars in the mid-eighteenth century. The Quebec Act enabling the Catholic church to sue to enforce tithes in Canada was a principal grievance which the Continental Congress directed to Parliament in 1774, claiming that the effect was to "establish the Popish religion." L. Pfeffer, *Church, State, and Freedom* 157 (1967).

720-723 (Brennan, J. dissenting). In short, the public displays at issue are not in keeping with any long standing tradition.

Furthermore, in the instant case, the displays were placed centrally within the Courthouse and on the front exterior of the City-County Building. For many people, including jurors, witnesses and lawyers, these places are compulsory destinations where by virtue of these displays they unavoidably must encounter religious symbolism.[29]

The unbroken tradition of protection against religious coercion spans the colonial and modern eras. In Pennsylvania, the Frame of Government of 1682 specified that "no person . . . shall at any time be compelled to frequent . . . any religious . . . place or ministry whatsoever . . . " Curry, *supra*, p. 75. The time was not restricted to the hours of worship services. The term "place" was chosen as opposed to church. Equivalent language appeared in the Virginia Bill for Religious Liberty which provided:

> "That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened, in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief . . . ". 12 Henig. Statutes of Virginia (1823) 84; cited in *Everson v. Board of Education*, 330 U.S. 1, 13 n.14. (1947).

As this Court has recognized: "The provisions of the First Amendment . . . had the same objective and were

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[29]In *Zorach v. Clauson*, 343 U.S. 306, 314 (1952), the Court held that: "Government may not . . . use secular institutions to force one or some religion on any person." See also, Curry, *supra* at 75-76.

intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute." *Everson*, 330 U.S. at 13.

Courts have been vigilant about keeping religion voluntary and coercion-free. Compulsion has been prohibited even if subtle, unintended or indirect. Tribe, *supra* at 1160. Even long accepted practices have been barred, such as compulsory chapel attendance at service academies, *Anderson v. Laird*, 466 F.2d 283 (D.C. Cir. 1972), and voluntary school prayer in compulsory settings. *Abington, supra*. Notwithstanding that praiseworthy public goals have been articulated (community education through shared time), the Court has declined to allow a practice placing students and teachers amidst sectarian symbols. *School District of the City of Grand Rapids v. Ball*, 473 U.S. 373 (1985). It has declined to place believers into blasphemous environments. *Wisconsin v. Yoder*, 406 U.S. 205 (1972). One need not attend religious activities in Veteran's Hospitals, 38 C.F.R. Sec. 17.34(a), or even Federal prisons, where involuntary "exposure" to religious material in the cell block has been prohibited. *Campbell v. Cauthron*, 623 F.2d 503 (8th Cir. 1980).

Petitioners in their briefs avoid dealing with the compulsory and coercive qualities of a courthouse and city hall. They would have the Court treat all types of public property in the same manner. Adoption of Petitioners' position, however, would enable government to coerce seasonal encounters with sectarian materials, a situation neither contemplated by the framers, nor ever previously countenanced by this Court.

2. *This Court's Occasional Willingness To Tolerate Neutral References To Religion Does Not Apply To The Inherently Denominational Displays In This Case.*

Although government may acknowledge religion, it ordinarily must avoid the highly sectarian or sacral elements of faith. In Zorach, 343 U.S. at 313, this Court stated that, "We are a religious people whose institutions presuppose a Supreme Being." It did not say that, "We are a people whose institutions presuppose the divinity of Jesus Christ" or "a people whose institutions presuppose the Chanukah miracle visited upon the Jews." In permitting legislative chaplaincy, this Court pointed out that, in fact, the clergyman had desisted from offering opening prayers that named Jesus. *Marsh*, 463 U.S. at 793 n.10.

Permissible publicly supported religion reflects the basic faith of the American people, but avoids specific ideology and the "ultimacy or formal structure of traditional sacral religions." Mirsky, Civil Religion and the Establishment Clause, 95 Yale L. J. 1237, 1250 (1986). In prior cases this Court has recognized and drawn the necessary line between civic piety and ideology. For example, it has proscribed the use of a specific "sacred text". *Stone v. Graham*, 449 U.S. 39 (1980); *Abington, supra.*

In pointing to current religious displays on government properties to justify its nativity display, the County identifies Moses with the Ten Commandments in this Court's chambers (County Brief at 25, n.4). Surely there is a vast difference between a figure which is part of a marble frieze at ceiling height, celebrating the majesty of the law, including, along with Moses and the decalogue, a procession of numerous other historical lawgivers as divergent as Draco, Hammurabi, Confucius and Solon and the nativity scene here.

William Van Alstyne has articulated the analytically helpful concept that while some governmental use of religion is lawful, "the [establishment] clause disallows civil government to appropriate that which is established by religion . . . "

> Every act by the state that appropriates from religion is necessarily profane. The very word, "profane," conveys the essential idea. It means "outside the temple," from "pro" [before] and from "fanus" [the temple], from which the state has taken and thus made profane by its relocation and its secularly ensconced use. So, as an example, one may be offended by state appropriative uses of the Latin cross: when taken outside the church and made a part of the civil state's own equipment, the cross is by that act, profaned.[10]

The City and County have appropriated the nativity scene and menorah from the religions which established these miraculous symbols within their own voluntary communities of faith and utilized them for centuries at the church, the synagogue and in private worship. This appropriation constitutes a breach of the Establishment Clause. The destructive potential for religion from its exploitation by government was referenced by Father Swiderski when he testified that, "There are many people also who have called, for instance, Pittsburgh City Council a circus, and to have a religious symbol related to that building would seem inappropriate" (J.A. 80).

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[10]Van Alstyne, What Is "An Establishment of Religion"? 65 N.C.L. Rev. 910, 914 (1987).

Moreover, one of the dangers portended when government unnecessarily employs religious tools is that government may thus put itself on a religious pedestal.[31] Since religion is fundamental to so many people there is a danger that religion can become "an irresistibly useful instrument of state policy."[32] Thus the obverse of cloaking religion with the power and prestige of government is that we may reinforce government with the aura of religious faith and authority. Where government then is allowed to associate itself with special symbols of religious sanctity, there is a subtle message conveyed that when citizens criticize government, they also criticize the Almighty. Father Swiderski gave the example of Iran as a country where religion and politics have mixed (J.A. 81). This very example has been described by playwright, Arthur Miller in these words:

> A Khomeini in our day is impossible to controvert, let alone dislodge, because he has achieved a total identification of religion with his political regime, so that to oppose him is to oppose God.
>
> N.Y. Times March 12, 1984 at A 17.

3. *The Constitution Prohibits Even Non-Preferential Support For Religion.*

Some analysts, such as Chabad, take the view that the Establishment Clause was intended only to prevent government from preferring or establishing a single religion. Historically, it seems improbable that a non-preferential view motivated the Framers in creating the Establishment Clause.

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[31]This is one of seven dangers described in Tribe, supra at 1286-1288.

[32]Van Alstyne, Trends in the Supreme Court Mr. Jefferson's Crumbling Wall—A Comment on *Lynch v. Donnelly*, 1984 Duke L.J. 770, 786.

In colonies with established churches, non-preferential aid schemes were attempted to allow minorities to restrict their taxes to support of their own churches and clergy. These plans often led to repression and were unpopular with minorities such as Baptists in New England. *See*, Curry, *supra*, at 165-176.

A relatively benign form of non-preferentialism became the subject of a decade's debate in Anglican Virginia where the proposed establishment would have included Catholics in addition to Anglicans and accommodated Mennonite objections to paid clergy. Madison published his *Memorial and Remonstrance* to marshall resistance to the proposed legislation. Presbyterians and Baptists also circulated petitions in opposition to the bill which died without a vote. Instead, the legislature passed Jefferson's Act for Establishing Religious Freedom which rejected all forms of establishment. "Thus the great debate about disestablishment in Virginia culminated in a decisive vote. . . ." *See Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 Wm. and Mary L. Rev. 875, 897 (1986).

Other colonies also were unreceptive to notions of non-preferentialism. A tax bill similar to that proposed for Virginia, though even more liberal and less preferential, was rejected in Maryland in 1785. Georgia had a non-preferential tax but declined to collect it and then abolished it. The Framers knew that non-preferential laws caused strife. *Id.* at 899-902.

In some respects the Virginia debate was a dry run and springboard for the First Congress' consideration of the treatment of religion in the First Amendment, whose principal draftsman was Madison. *Id.* at 899. Congress rejected non-preferential models which were embraced in two early drafts.

> Congress shall make no law establishing one Religious Sect or society in preference to others, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed;

and

> Congress shall make no law establishing any particular denomination or religion in preference to another, or prohibiting the free exercise thereof, nor shall the right of conscience be infringed.

Journal of the First Session of the United States Senate (Sept. 3, 1789).

Obviously, if non-preferentialism and freedom of conscience were its only goals, Congress could have adopted either of these drafts. As this Court has recognized, the Framers intended no powers for the federal government in religion, which included a broad ban on aid to single or numerous faiths.

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. *Everson*, 330 U.S. at 15.

B. The Religious Displays In This Case Go Far Beyond Any Permissible Accommodation Of Religion.

In a series of decisions, this Court has recognized that the state may "accommodate" religion without offending the Establishment Clause if the "accommodation" is limited to removing state-imposed burdens on the free exercise of religion. *See, e.g., Corporation of Presiding Bishop of the Church of Latter Day Saints v. Amos*, ___U.S. ___,

107 S.Ct. 2862 (1987); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Zorach, supra.*

Relying on this doctrine, Petitioners suggest that the state's willingness to erect a creche and menorah in this case represents nothing more than an accommodation of religion. A similar argument was made by the State of Alabama in *Wallace v. Jaffree*, 472 U.S. 38 (1985), in an attempt to defend its moment of silence law. Justice O'Connor's response to Alabama's position is equally applicable here:

> If we assume that the religious activity that Alabama seeks to protect is silent prayer, then it is difficult to discern any state-imposed burden on that activity that is lifted by [the Alabama law]. No law prevents a student who is so inclined from praying silently in public schools . . . Of course, the State might argue that [its law] protects not silent prayer, but rather group silent prayer under State sponsorship. Phrased in these terms, the burden lifted by the statute is not one imposed by the State of Alabama, but by the Establishment Clause . . . In my view, it is beyond the authority of the State of Alabama to remove burdens imposed by the Constitution itself . . . .

Id. at 83-84 (O'Connor, J., concurring).

Likewise, no state-imposed burden prevents citizens of Allegheny County from celebrating Christmas or Chanukah. Here, as in *Jaffree*, if the burden that petitioners seek to lift is the prohibition against official observance of religious holidays with sectarian symbols, that burden is "imposed by the Constitution itself." *Id.*

V. THE PUBLIC FORUM DOCTRINE PROVIDES NO JUSTIFICATION OF THE RELIGIOUS DISPLAYS HERE.

At the conclusion of its brief, Petitioner Chabad makes an effort to define the City Hall steps area as "public forum" (Chabad Brief at 30-31)[33] in the manner of the park in *McCreary v. Stone*, 739 F.2d 716 (2d. Cir.) *aff'd.* by an equally divided court sub. nom., *Board of Trustees of the Village of Scarsdale v. McCreary*, 471 U.S. 83 (1985).[34] The City of Pittsburgh, which controls the relevant portion of the City-County Building, disputes Chabad's position. The record does not reflect that the City has opened its front steps or walls for public expression. Indeed, a Pittsburgh City Ordinance provides that property under City control is not open for political or commercial displays.[35]

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[33]Chabad suggests that it did not have sufficient opportunity to develop this position below. Chabad was permitted to intervene and to present evidence (J.A. pp. 61, 211). In fact, Chabad's counsel withdrew his question using the term "public forum" and indicated, "we'll argue this in briefs, I guess" (J.A. 234-236). The question was not briefed or argued below by Chabad.

Chabad's present position is based on vague testimony that there was a deomonstration "brought to" the City County Building (J.A. 244). No testimony evidences how close the demonstrators were to the steps themselves, how long they remained, or whether the City even knew of the demonstration. Demonstrations outside a Courthouse of limited duration hardly require that the Court permit placement of religious symbols on a Courthouse entrance continuously during a six week period.

[34]The Second Circuit held that placement of a creche in a municipal park did not violate the Clause. Significantly, the display did not take place within the trappings of a government center, but was a private exhibit of only two weeks duration held in a traditional public forum. As such, unlike the present situation, the Scarsdale display lacked the imprimatur and coercive aspects of government.

[35]*See* Pittsburgh Municipal Code (419.04. *Business and Political Advertising)*, which states *inter alia* that:

(Continued on next page)

Petitioner Allegheny County also implies that the placement of the creche in a "gallery/forum" validates the display.[36]

The sites used for the menorah and the creche were not public forums[37] under this Court's analysis of the spectrum of public places. The first category includes "quintessential public forums", traditionally streets and parks where the government may not prohibit access but may enforce regulations of time, place and manner. The second category outlined is public property which the state may open up for expressive activity. The third category consists of property which is not a public forum. *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1983); *Hague v. CIO*, 307 U.S. 496 (1939); *Schneider v. State*, 308 U.S. 147 (1939).[38]

(Continued)

No person shall display any advertising matter on any property which is owned or controlled by the City for either business or political purposes and no display shall be made in connection with any municipal, state or national election of pictures or written matter relating to the various candidates for office.

[36]County Brief at 30-33. Respondents reject the "gallery forum" as an accurate terminology to describe the Courthouse's interior.

[37]The forum positions taken by Chabad and vaguely implied by the County are anomalous and irrelevant to consideration. Inasmuch as the displays of the menorah and the creche were City and County displays, they amount to speech by the respective governments themselves. The Establishment Clause is "the only substantive constitutional constraint on what governments say." M. Yudof, *When Government Speaks: Politics, Law and Government Expression in America*, 214 (1983). *Lynch* has taught that even if placed in a park, a government's religious display still will be judged by its components and context.

[38]The properties here are not analogous to that in *Widmar v. Vincent*, 454 U.S. 263 (1981). There, in striking down a university regulation prohibiting the use of buildings and grounds for purposes of religious worship or teaching, the Court held that the separation of church and state is a compelling state interest, but that a policy of equal access in a university does not offend the Establishment Clause as that setting

(Continued on next page)

Apparently, the County's implication is that some use of the adjacent gallery by the public converts the grand staircase into the second type of public forum. However, some selected use, which is here the case since the government screens the artwork for quality and theme before choosing to display it, (J.A. 201-203) "does not transform government property into a public forum." Perry, 460 U.S. at 47, *citing Greer v. Spock*, 424 U.S. 828, 838 n.10 (1976). Even if the second type of limited public forum were present, that factor means only that "entities of a similar character" could have access to the salient venue. *Perry*, 460 U.S. at 48. The Holy Name Society donating the creche with its religious message bears no resemblance to artists who submit their works for screening and display in the adjacent Courthouse gallery.

There is no dispute between Respondents and the City that the front face of the City-County Building is a non-public forum (J.A. 235-236). The City had the right and indeed was bound by local ordinance to reserve the building for the core functions of government. "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Perry*, 460 U.S. at 46, quoting *United States Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114 at 129-30, quoting *Greer v. Spock*, 424 U.S. 828, 836 (1976), in turn quoting *Adderley*

(Continued)

"does not confer any *imprimatur* of state approval of religious sects or practices." *Id.* at 274 (emphasis added). The religious uses of the City-County Building and Courthouse were more publicly prominent that in *Widmar*, and, because of the core governmental functions, conveyed a much stronger message of endorsement. Moreover, the students in *Widmar* were under no compulsion to attend college or be exposed to the religious matter. The *Widmar* situation, unlike those at issue, was unquestionably voluntary.

v. Florida, 385 U.S. 39, 47 (1966). Moreover, there is evidence that restricting the premises to their intended use has not been shown to force those wishing to have a display to utilize more costly channels. *Martin v. City of Struthers*, 319 U.S. 141 (1943); *City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

Finally, no finding of a public forum is required by *United States v. Grace*, 461 U.S. 171 (1983) in which a statute was held unconstitutional insofar as it banned expressive activity involving the Supreme Court's sidewalks.[39] The relief sought by Chabad and the County would permit round-the-clock displays unrelated to governmental functions in the Courthouse and at the head of the raised steps and front wall of the City-County Building. Such a result would go well beyond *Grace*, and other First Amendment precedent, and force local governments to renounce regulations based upon reasonableness.

The menorah at issue did not rest on a sidewalk that was indistinguishable from other city sidewalks but stood atop the City-County Building steps and was attached to a main front column of that edifice. To declare this portion of the premises a public forum would open it to other displays and signage on a long-term basis. Nor, in *Grace*, did the Court deem its interior to be a public forum for expressive activities or displays, or suggest that its front columns were appropriate sites for hanging sectarian symbols.

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[39]In *Grace*, 461 U.S. at 183-184, the Court stated that "[t]here is nothing to indicate to the public that these sidewalks are part of the Supreme Court grounds or in any way different from other public sidewalks . . . ". The Court did not overturn the legislation insofar as it applied to the remainder of the Court's premises.

CONCLUSION

> "Symbolism is a primitive but effective way of communicating ideas . . . a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment." *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 632.

Petitioners urge this Court to extend its holding in *Lynch* to permit governmental displays of deeply religious symbols not only at core government buildings but even within its courthouses. In so doing they ask this Court to ignore the divisive effect of such displays on objective observers, as documented in this case. For that reason Petitioners' effort to defend their displays as an illustration of religious pluralism in America is fundamentally misguided. It is precisely because this nation celebrates its citizens' rights to diverse religious beliefs that government should be precluded from embracing the message of one or more to the exclusion of others.

Surely the attraction of a "bright line" test should not be used to overcome those prohibitions on government so carefully imposed by the framers. Far from preserving respect for religious diversity in our pluralistic society, allowing government to now begin using religious displays in core government buildings endangers it. "It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding

these beginnings." *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 641 (1943).

Respondents urge therefore that the judgment of the Court of Appeals be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1988

COUNTY OF ALLEGHENY, ET AL., PETITIONERS,

v.

AMERICAN CIVIL LIBERTIES UNION,
GREATER PITTSBURGH CHAPTER, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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In the Supreme Court of the United States

OCTOBER TERM, 1988

Nos. 87-2050, 88-90, and 88-96

COUNTY OF ALLEGHENY, ET AL., PETITIONERS,

v.

AMERICAN CIVIL LIBERTIES UNION,
GREATER PITTSBURGH CHAPTER, ET AL.

**On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit**

REPLY BRIEF FOR PETITIONERS COUNTY OF ALLEGHENY AND CITY OF PITTSBURGH

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1. PETITIONERS' DISPLAYS ARE NOT COERCIVE AND THEREFORE DO NOT VIOLATE THE ESTABLISHMENT CLAUSE.

Although respondents devote many pages to their efforts to distinguish this case from *Lynch v. Donnelly*, 465 U.S. 668 (1984), they disregard almost entirely the fundamental similarity that, in our view, should be dispositive. Like the display approved in *Lynch*, petitioners' holiday displays are wholly passive and non-coercive in nature. Accordingly, they do not "establish" either a specific religious denomination or religion in general, within the meaning of the Establishment Clause of the First Amendment. The historical origins of the Establishment Clause strongly support this position, and this

Court has recognized the importance of the historical evidence in understanding "what the draftsmen intended the Establishment Clause to mean." *Marsh v. Chambers*, 463 U.S. 783, 790 (1983).

The Establishment Clause was intended to remove the threat of religious coercion and persecution resulting from a governmentally established official religion. The purpose of the clause was, in the words of James Madison, that "Congress should not *establish* a religion, and *enforce* the legal observation of it by law, nor *compel* men to worship God in any manner contrary to their conscience." 1 Annals of Cong. 730 (J. Gales ed. 1834) (August 15, 1789) (emphasis supplied). Madison explained that "the people feared one sect might obtain a preeminence, or two combine together, and establish a religion to which they would *compel* others to conform." *Id.* at 731 (emphasis supplied). Madison thus echoed the theme that he had sounded several years earlier in his 1785 Memorial and Remonstrance against Religious Assessments, a vigorous opposition to proposed Virginia legislation that would have established a tax for the support of teachers of the Christian religion. Quoting the 1776 Virginia Declaration of Rights, Madison wrote in the Memorial and Remonstrance that religion "can be directed only by reason and conviction, not by force or violence." He warned "[t]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever[.]" Memorial and Remonstrance ¶ 3, reprinted in *Everson v. Board of Education*, 330 U.S. 1, 65-66 (1947) (appendix to dissenting opinion of Rutledge, J.).

The concept of coercion or compulsion, either direct or through the power of the purse, was central in the minds of the Framers. *See generally* McConnell, *Coercion: The Lost Element of Establishment*, 27 Wm. & Mary L. Rev.

933 (1986). This point is further confirmed by the historical background against which the First Amendment's prohibition against "law[s] respecting an establishment of religion" was adopted.

On the eve of the American revolution, most of the colonies maintained establishments of religion, *i.e.*, state endorsed and supported churches coupled with officially sanctioned discrimination, of varying degrees of severity, against those holding dissenting views. One scholar reports, for example, that "Massachusetts imprisoned Baptists and any others who refused obedience to the government in matters of support for religion." L. Levy, *The Establishment Clause* 2 (1986). Virginia too regarded certain Baptist conduct as criminal. *Id.* at 3. Taxes were levied to support the clergy, and test oaths of varying kinds remained a condition for public office in most jurisdictions. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 Wm. & Mary L. Rev. 839, 852-853 (1986). Although by the time the First Congress met to consider adoption of the Bill of Rights, members of nonestablished sects were frequently relieved of the obligation to support the adopted religion, dissenters were required to pay for clergy or teachers of their own religious persuasion. *Id.* at 853.

The historical evidence leaves little doubt that the Establishment Clause was intended to prohibit state coercion of support for religion, either through direct legal compulsion or through taxation or the use of public funds. Although language in some of this Court's decisions suggests that some non-coercive governmental action also may violate the Establishment Clause, the historical basis for those remarks is problematical at best.

This Court's first suggestion that the Establishment Clause may be violated even in the absence of governmental coercion was dictum in *Engel v. Vitale*, 370 U.S. 421, 430 (1962). In that case, the Court said, without

citation of authority, that coercion is not a necessary element of an Establishment Clause violation, but the Court quickly went on to add that "[t]his is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals." *Id.* at 430-431. Because the Court found actual coercion in the school prayer context of *Engel*, the Court's comment on the significance or lack of significance of direct governmental compulsion was unnecessary to the Court's decision.

Other cases asserting the insignificance of the absence of coercion, such as *Committee for Public Education v. Nyquist*, 413 U.S. 756, 786 (1973), in fact involved the validity of statutorily mandated expenditures of public tax funds to aid religious schools. This kind of financial coercion was just as abhorrent to the Framers as physical compulsion.

Even if governmental coercion is not a prerequisite for a finding of an Establishment Clause violation, the purpose and history of the Clause show that coercion, or the lack thereof, is the single most important element of the analysis. In *Lynch*, this Court specifically recognized that the non-coercive nature of the creche display was a factor that mitigated strongly against any finding that the display operated impermissibly to advance religion. The Court stated (465 U.S. at 686):

> To forbid the use of this one passive symbol—the creche—at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, and while the Congress and legislatures open sessions with prayers by paid chaplains, would be a stilted overreaction contrary to our history and to our holdings.

See also Zorach v. Clauson, 343 U.S. 306, 311 (1952) (in sustaining the New York "released time" program against constitutional attack, the Court explained: "There

is a suggestion that the system involves the use of coercion . . . . There is no evidence in the record before us that supports that conclusion. . . . If in fact coercion were used, . . . a wholly different case would be presented").

The Pittsburgh displays are clearly passive and noncoercive. As the district court found, "none of the people who enter the Courthouse are required to do anything; they are not required to read, or to sing, or to pause or to reflect. Neither are people required to pause or look or read or make any gestures where the menorah is concerned; they are merely displays" (J.A. 9). If the creche or menorah gives offense to anyone, that person is free to ignore or avoid it. Because the display is passive in nature, it does not command action or obedience; unwilling observers may simply turn away or avert their eyes.

Respondents argue that those who are required to be present in the Courthouse—jurors, criminal defendants, subpoenaed witnesses—are involuntarily exposed to the creche (ACLU Brief at 5-6). Legal compulsion to attend court, however, is far different from compulsion to adhere to a particular set of religious beliefs or even to view the nativity scene. Not only are all visitors to the Courthouse entirely free to avoid any contact with the Christmas display, but the record shows that 90 to 95 percent of the people who come to the Allegheny County Courthouse never pass by the main staircase and therefore never see the creche (J.A. 185).

In fact, not only is avoidance of the Pittsburgh displays possible, it is far easier than avoidance of the Pawtucket display upheld in *Lynch*. That display was in a main downtown park close to both the commercial and governmental centers of the City. By contrast, the display in the Courthouse is not visible to any passer-by outside the Building, and even the majority of persons who actually enter the building do not see the display.

Similarly, because the City-County Building has several entrances, it is also possible to avoid the menorah (J.A. 194). These facts distinguish this case from *ACLU v. City of St. Charles*, 794 F.2d 265 (7th Cir.), *cert. denied*, 479 U.S. 961 (1986), and other similar cases, which have invalidated municipal displays of a cross that were so prominent as to dominate an entire community and virtually compel attention to be paid.

Respondents argue that petitioners' position "lacks any limiting principle" and, if accepted, would permit the conduct of a Christmas Mass within the Courthouse (ACLU Brief at 11, 17). This argument presupposes that such a religious service would not be permitted under the Establishment Clause, a proposition that is far from self-evident. *Cf. Widmar v. Vincent*, 454 U.S. 263 (1981). Certainly, this Court has never held that a voluntary, non-coercive religious service conducted on public property as part of an overall holiday celebration would violate the First Amendment. In any event, the very "threat" that respondents contend is posed here was also raised as a ground for disapproving the nativity scene in *Lynch*, and the argument was rejected. *See* 465 U.S. at 710 (dissenting opinion). This is nothing more than an attempt to reargue *Lynch*. It does not distinguish this case from *Lynch* in any way whatever.

2. THE ESTABLISHMENT CLAUSE DOES NOT PROHIBIT RECOGNITION OF THE RELIGIOUS ORIGINS OF SECULAR HOLIDAYS.

Even if this Court rejects the argument that the non-coercive nature of the government displays by itself defeats respondents' Establishment Clause challenge, the holiday displays at issue here are nevertheless permissible because they at most acknowledge religion; they do not "establish" or endorse religion generally or any one faith in particular. This Court recognized in *Lynch* that "there is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." 465 U.S. at 674.

Respondents seek to force the government to ignore the historical and cultural role that religion plays in the lives of Americans and to bar any official recognition of the religious origins of Christmas and Chanukah. This the Establishment Clause does not require.

The principal governmental acknowledgment of the religious origin of Christmas is, after all, the well-established recognition of the day as a public holiday. The name of the holiday itself, derived from the phrase "Christ's Mass," reflects the holiday's religious background. Nevertheless, no party challenges the recognition of Christmas, so named, as a public holiday, and no party contends that the use of public funds to pay public employees for the holiday establishes Christianity as a state-approved religion.

In light of these undeniable facts, it is difficult to see how the challenged holiday displays can present any serious constitutional problem. This Court has held that acknowledgment of the religious, historical foundation of a secular holiday through the use of symbols is not the same as an endorsement of religion. *Lynch v. Donnelly*, *supra*, 465 U.S. at 680, 685. The Constitution does not prohibit the display of symbols, even symbols that contain a religious element. The fact that symbols with religious connotations may offend or upset some people does not make a display unconstitutional. *ACLU v. City of Birmingham*, 791 F.2d 1561, 1572 (6th Cir.), *cert. denied*, 479 U.S. 939 (1986) (dissenting opinion) ("not everything that gives offense in this world is unconstitutional"); *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 134 (7th Cir. 1987) (dissenting opinion) ("insult without injury is not even enough to create a case or controversy"), citing *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). As the Court said about the nativity scene challenged in *Lynch*, "any notion that these symbols pose a real danger of establishment of a state church is far-fetched indeed." 465 U.S. at 686.

Of course, the religious origins depicted by the creche and menorah may cause some observers to reflect on the continuing religious elements of the holiday season. This may, in some minor way, benefit religion. Indeed, the Court in *Lynch* assumed, for the sake of argument, that the creche in Pawtucket advanced religion "in a sense." 465 U.S. at 683. The Court recognized, however, that any such benefit would be, at most, indirect, remote, and incidental, and the Court held that governmental action conferring such a benefit on religion does not thereby violate the Establishment Clause. *Id.*

In *Everson v. Board of Education*, *supra*, 330 U.S. at 16, this Court repeated, with apparent approval, Jefferson's statement that the Establishment Clause "was intended to erect 'a wall of separation between church and state.'" But the "wall of separation" metaphor was not then, and clearly is not now, an accurate description of this Court's rulings. The Court has sustained, against Establishment Clause challenges, opening legislative sessions with a prayer by a state-paid chaplain, *Marsh v. Chambers*, 463 U.S. 783 (1983); public school "released time" programs for religious training, *Zorach v. Clauson*, 343 U.S. 306 (1952); expenditures of public money for textbooks provided to students of church-sponsored schools, *Board of Education v. Allen*, 392 U.S. 236 (1968); use of federal monies for the construction of buildings used exclusively for secular purposes at church-sponsored colleges that combine secular and religious education, *Tilton v. Richardson*, 403 U.S. 672 (1971); tax exemptions for church property, *Walz v. Tax Comm'n*, 397 U.S. 664 (1970); and the establishment of Sunday closing laws, *McGowan v. Maryland*, 366 U.S. 420 (1961). The holiday displays at issue here do not advance or endorse religion to any greater degree than these constitutionally permissible governmental actions.

3. RESPONDENTS HAVE MISCONSTRUED *LYNCH* AND ITS APPLICATION TO THIS CASE.

a. The Proper Context for Analysis of the Displays Is the Context of the Holiday Season.

Respondents and the amici supporting them erroneously argue that the holiday displays here at issue are constitutionally distinguishable from the display approved in *Lynch* because the displays here are not surrounded by purely secular objects such as reindeer, candy-striped poles, and a talking wishing-well. Respondents argue that it is the additional secular items that establish the context within which the creche may be perceived and understood as part of a secular holiday (ACLU Brief at 15-16). But *Lynch* did not identify the physical context of the display as the proper focus for constitutional analysis. The Court in *Lynch* specifically held that the critical constitutional focus was on the creche "in the context of the Christmas season." 465 U.S. at 679. As Justice O'Connor wrote in her concurring opinion, it is "the overall holiday setting [that] changes what viewers may fairly understand to be the purpose of the display." *Id.* at 692. Both the Court's opinion and the concurring opinion thus recognized that it is the holiday context, not the proximity of secular items, that supports the public display of a nativity scene.

Contrary to respondents' arguments, secular items such as talking wishing-wells are simply not "constitutionally necessary." *American Jewish Congress v. City of Chicago*, *supra*, 827 F.2d at 130 (dissenting opinion). When properly considered within the context of the overall holiday season, petitioners' displays, like that in *Lynch*, merely recognize the secular celebrations of the season and do not have the principal effect of advancing religion.

In any event, respondents misstate the facts when they allege that the holiday displays at issue here are "purely religious and undiluted" (ACLU Brief at 10). Respondents' own exhibits show, in living color, that the creche in the Allegheny County Courthouse is surrounded by secular items such as poinsettia plants, decorated Christmas trees, and wreaths (J.E.V. 6-8).[1] The creche occupies less than one-half of the space devoted to the overall display. A frequent addition to the display is musical programs presented by high school and other local groups. The groups perform secular and religious Christmas carols and popular songs. During the holiday season, musical programs are presented on the main staircase of the Courthouse every weekday during the lunch hour (J.A. 158). Frequently, two or more groups perform in a single day (J.E.V. 28). The entire display, including the creche, poinsettia plants, evergreen trees, wreaths, and choral programs, is intended to celebrate the holiday season and to express holiday wishes of peace and good will. The choral segment of the display is specially dedicated to world peace and brotherhood and to prisoners and those missing in action in the Vietnam War (J.A. 160).

Similarly, the menorah is part of a larger secular display. The 18-foot menorah is dwarfed by a 45-foot decorated Christmas tree and surrounded by secular items such as signs for the United Way and a local flower display. Pet. App. 12a-13a.[2] The district court correctly found that "the creche was but a part of the holiday decoration of the stairwell and a foreground for the high school choirs which entertained each day at noon. . . . [I]f there was any religious significance to the menorah it was but an insignificant part of another holiday display." Pet. App. 4a. Accordingly, petitioners'

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[1] "J.E.V." refers to the Joint Exhibit Volume filed in this Court.

[2] "Pet. App." refers to the appendix to the petition in No. 87-2050, filed by petitioner County of Allegheny.

displays would be permissible even under the narrow interpretation of *Lynch* advocated by respondents.

b. There Is No Constitutionally Significant Distinction between a Display Placed in a Private Park with Obvious and Extensive Government Involvement and a Display within, or in Front of, a Public Building.

Respondents also seek to distinguish *Lynch* from this case because, while the Pawtucket creche stood on private property, the Pittsburgh creche and menorah occupy government property. Again, respondents find constitutional distinctions where none exist. The creche in Pawtucket was officially sponsored to a degree not approached by the governmental involvement of the County of Allegheny and the City of Pittsburgh. In *Lynch*, the city owned, erected, and dismantled the creche. 465 U.S. at 671. Each year, the mayor of Pawtucket arranged and oversaw the details of the display. In fact,

> [w]hen the Hodgson Park display is opened, ceremonies at the Park are held in conjunction with City Hall, 300 feet away. Santa arrives at the Park in a City fire truck. He and the Mayor throw a switch, illuminating the lights at the Park and City Hall. . . .

Donnelly v. Lynch, 526 F. Supp. 1150, 1156 (D.R.I. 1981). The Court recognized that these actions closely identified the City with the creche display. Indeed, it was the City's involvement that raised a First Amendment issue in the first place. Had it not been for the City's clear identification with the Pawtucket display, no constitutional issue would have been presented. In upholding the City's involvement, the Court observed that the display "is essentially like those to be found in hundreds of towns or cities across the nation—*often on public grounds*—during the Christmas season." 465 U.S. at 671 (emphasis supplied). Ownership of the park was irrelevant to the analysis of *Lynch* and it is irrelevant here.

The Seventh Circuit, which decided *City of Chicago*, recently upheld the constitutionality of a holiday display located on a village hall lawn. *Mather v. Village of Mundelein*, No. 88-3226 (7th Cir. Jan. 4, 1989) (per curiam).[3] The court in *Mather* found that "the display in Mundelein leads viewers to focus on the village hall more than the display in Pawtucket did; the display in Mundelein is in the shadow of the [village hall] building, which serves as backdrop." *Id.*, slip op. at 4. Nevertheless, the court of appeals rejected the argument that placement of the display on the lawn of the village hall distinguished the case from *Lynch*. The court noted that "[d]etails that would be important to interior decorators do not spell the difference between constitutionality and unconstitutionality." *Id.*

Similarly unconvincing is respondents' argument that the seasonal displays in this case are unconstitutional because of their location at buildings that house "core functions" of government (ACLU Brief at 10). Relying on recent cases that sought to limit *Lynch* narrowly to its precise facts, respondents argue that placement of the displays in front of or inside government buildings somehow automatically involves a First Amendment violation. *See American Jewish Congress v. City of Chicago, supra*, 827 F.2d at 126; *ACLU v. City of Birmingham, supra*, 791 F.2d at 1566.

In *Lynch*, the Court mentioned the park setting of the Pawtucket creche only once, during a brief factual recitation in the first paragraph of the first page of the 19-page majority opinion. 465 U.S. at 671. Yet, respondents argue that the physical placement of the display was so central to the Court's analysis that move-

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[3] A copy of the *Mather* opinion has been lodged with the Clerk of the Court. In addition, on January 26, 1989, the California Second District Court of Appeal sustained the display of a menorah in the rotunda of the Los Angeles city hall. *Okrand v. City of Los Angeles*, No. B026035 (Cal. Ct. App. Jan. 26, 1989). A copy of the opinion in *Okrand* has also been lodged with the Clerk of the Court.

ment of the creche to the grounds of a public building distinguishes this case from *Lynch* and changes the proper result. Once again, respondents misconstrue *Lynch* and ignore its holding that it is the context of the Christmas season that controls, rather than the precise physical location of the display. *Id.* at 679.

Moreover, respondents' suggestion that challenges to holiday displays should be decided on the basis of whether the display is located at buildings that house the "core functions of government" is impracticable. Such a holding would require lower courts to determine whether or not a building is devoted to such core governmental functions. After reviewing, in another context, years of attempts by the federal courts to make constitutional distinctions based on whether a particular governmental function is core or "integral," this Court held that such an approach is "unsound in principle and unworkable in practice." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 546 (1985) (striking down use of functional standard to grant states immunity from federal regulations under the Commerce Clause).

4. RESPONDENTS HAVE MISCHARACTERIZED BASIC FACTS ABOUT THE NATIVITY SCENE.

In addition to the factual and legal errors discussed above, respondents' briefs contain several factual inaccuracies, which we address briefly here to avoid any possible misimpression.

a. The nativity scene in the Allegheny County Courthouse has never been arranged or displayed "in an altar-like setting," nor has it ever been used for worship or as an altar (ACLU Brief at 4, 7). Respondents' assertions to the contrary apparently refer to one occasion during the 1970's when photographs of Americans missing in action in the Vietnam War were posted in an area separate from, and in front of, the creche (J.A. 188-190). Although prayers were apparently offered on that occa-

sion, the holiday display was not used, then or at any other time, as a setting for worship.

b. Father Yurko of the Holy Name Society has never been "retained" to serve as a "consultant" to Allegheny County nor does he have complete control over the County's Christmas display (ACLU Brief at 22). Father Yurko's role is strictly confined to the assembly, display, and arrangement of the creche (J.A. 165). He is not involved with the planning, display, or arrangement of the overall Christmas display (J.A. 199), or with the coordination and planning of the choral program (J.A. 157, 178).

c. Respondents and their amici present arguments based on the alleged motivation of the Holy Name Society in donating the nativity scene to the County of Allegheny (ACLU Brief at 22; American Jewish Congress Brief at 18; American Jewish Committee Brief at 24). No evidence was presented as to the motivation for the donation. Accordingly, the arguments of respondents and their amici are wholly speculative.

d. The main staircase of the Allegheny County Courthouse has been used, from time to time, for events and programs other than the Christmas holiday display (J.A. 176). Moreover, although the staircase itself is not a gallery, the staircase begins in a large area that is used throughout the year for art displays and other civic and cultural events (J.A. 163, 167, 176).

5. THE "EQUAL TREATMENT" AND PUBLIC FORUM ARGUMENTS RAISED BY CHABAD ARE NOT PROPERLY BEFORE THIS COURT.

Petitioner Chabad seeks to use this case as a vehicle to establish an affirmative right of religious groups to include their symbols in public holiday displays (Chabad Brief at 27). Likewise, Chabad now argues (*id.* at 30), the steps of the City-County Building are a "public

forum" and therefore Chabad was affirmatively entitled to display its menorah there. Neither of these arguments is properly in the case, and neither was the subject of any proceedings below. No evidence was presented on either issue in the district court, and neither the district court nor the court of appeals addressed itself to Chabad's contentions. Although the second question presented in Chabad's petition purports to raise the issue of Chabad's entitlement to display a menorah, the simple fact is that the City of Pittsburgh voluntarily permitted the menorah to be included in the City's holiday display and Chabad therefore can make no claim against the City. Any questions regarding Chabad's asserted right to add a menorah to a public holiday display or regarding the alleged "public forum" status of the steps of the City-County Building can and should await resolution in a case where those issues are properly presented and where an adequate evidentiary record has been developed in the courts below.

6. CONCLUSION

The historical basis of the Establishment Clause and recent opinions of this Court show that the passive, noncoercive holiday displays exhibited by petitioners, taken in the context of the overall holiday setting, do not constitute a violation of the Establishment Clause. This case is not distinguishable from *Lynch* in any constitutionally significant way. Like the display in Pawtucket, the Pittsburgh displays are

> no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as "Christ's Mass," or the exhibition of literally hundreds of religious paintings in governmentally supported museums.

Lynch v. Donnelly, *supra*, 465 U.S. at 683 (citations omitted).

For all the foregoing reasons, as well as the reasons stated in the opening briefs of petitioners County of Allegheny and City of Pittsburgh, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1988

COUNTY OF ALLEGHENY, ET AL., PETITIONERS

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a local community violates the Establishment Clause of the First Amendment when it includes a nativity scene and a menorah in an annual holiday display located on public property.

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INTEREST OF THE UNITED STATES

The United States participates in, or permits on public land, various displays and celebrations relating to the seasons of Christmas and Chanukah. For example, the National Park Service includes a privately-owned nativity scene in its annual government-sponsored Christmas Pageant for Peace, which takes place on public park land (the Ellipse) immediately south of the White House. For a number of years, the Park Service also has granted a demonstration permit to a private group to erect and maintain a menorah on public park land during the holiday season.[1] These and other established practices are called into question by the judgment below.

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[1] For approximately eight years prior to 1986, the menorah was erected in Lafayette Park. In 1986, the National Park Service issued regulations prohibiting structures in Lafayette Park (36 C.F.R. 7.95(5)(x)), and the menorah is now erected in the southwest quadrant of the Ellipse.

More generally, from the earliest days of the Republic to the present, the federal government has felt free to acknowledge and recognize that religion is part of our heritage. The United States thus has a substantial interest in the broader question raised by this case, which is whether the Constitution requires us rigidly to exclude from our public ceremonies and celebrations and from our public lands all acknowledgment of the religious elements in our national traditions. The United States has previously participated as *amicus curiae* in *Board of Trustees of the Village of Scarsdale* v. *McCreary*, 471 U.S. 83 (1985); *Lynch* v. *Donnelly*, 465 U.S. 668 (1984); *Marsh* v. *Chambers*, 463 U.S. 783 (1983), and other cases raising this question in a variety of contexts.

STATEMENT

1. For a number of years during the Christmas season, the City of Pittsburgh has placed a large Christmas tree, decorated with lights and ornaments, on the front steps of the City-County Building in downtown Pittsburgh. Since 1982, at the time of the Jewish celebration of Chanukah, the City has erected next to the Christmas tree a privately-owned menorah. In front of the Christmas tree is a large sign bearing the mayor's name that reads:

> SALUTE TO LIBERTY
>
> DURING THIS HOLIDAY SEASON, THE CITY OF PITTSBURGH SALUTES LIBERTY. LET THESE FESTIVE LIGHTS REMINDS US THAT WE ARE THE KEEPERS OF THE FLAME OF LIBERTY AND OUR LEGACY OF FREEDOM.

Also included in this seasonal display are a sign advertising a charity fund drive, a sign advertising a tropical flower display at the City's Conservatory, and traditional seasonal

decorations in the doorways leading to the interior of the City-County Building. All the elements of the display—the Christmas tree, the signs, the menorah, and the decorations—are installed by city employees. Pet. App. 4a-5a.[2]

One block away from the City-County Building stands the Allegheny County Courthouse. Since 1981, the county has permitted for approximately six weeks each year the display of a nativity scene enclosed by a fence on the grand staircase of the first floor of the courthouse. The creche is owned, erected, arranged, and disassembled by a private organization, and a sign in front of the creche indicates its donor. The county, however, stores the creche in the basement of the courthouse and supplies a dolly and minimal aid to transport it to and from the courthouse basement. The County Bureau of Cultural Programs decorates the area with red and white poinsettia plants, evergreen trees with red bows, and Christmas wreaths. Other seasonal decorations are displayed throughout the courthouse building. Pet. App. 3a-4a.

The first floor of the courthouse is used throughout the year for art displays and other civic and cultural events and programs. During the weeks prior to Christmas, the county sponsors Christmas carol programs. The chorale groups, mostly high school students, stand on the grand staircase behind the nativity scene. They sing popular songs and both religious and secular Christmas carols. The caroling is broadcast by loudspeakers to the public in the courthouse. The program is annually dedicated to the universal themes of world peace and brotherhood and to the memory of persons missing in action in the Vietnam War. Pet. App. 3a-4a.

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[2] "Pet. App." refers to the appendix to the petition in No. 88-90.

2. Respondents brought suit on December 10, 1986, against the City of Pittsburgh and Allegheny County claiming that the inclusion of the menorah and the nativity scene in their annual holiday celebration violated the Establishment Clause of the First Amendment. The district court, following an evidentiary hearing, denied respondents' motions for injunctive and declaratory relief (Pet. App. 34a-40a). Applying the three-pronged test of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), the court concluded (Pet. App. 40a) that the displays had a secular purpose, that their effect was not to advance or inhibit religion, and that they did not create an excessive entanglement of government with religion.

The district court found that the intention of the City and county was merely "to celebrate the holiday season" and not "to affect anyone's religion" (Pet. App. 36a). The court further found, relying on this Court's decision in *Lynch* v. *Donnelly*, 465 U.S. 668 (1984), that the use of the creche and the menorah in the context of the holiday season did not advance religion in any significant way. "In the case of the county," the court noted (Pet. App. 40a), "the creche was but part of the holiday decoration of the stairwell and a foreground for the high school choirs which entertained each day at noon. In the case of the city, if there was any religious significance to the menorah[3], it was but an insignificant part of another holiday display." Finally, the court found (*ibid.*) that the display "did not create an excessive entanglement of government with religion" and that there was no evidence "that the displays have caused political division." The court noted (*id.* at

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[3] The district court found (Pet. App. 39a) that "[t]he Chanukah menorah has no particular religious significance when placed in a public location beyond signifying a 'Light to the World' somewhat like the Christmas message 'Peace on Earth, Goodwill to Men.' "

38a-39a) that "[v]ery little, if any, public funds" are expended on the creche and that the expense to the city of erecting the menorah is minimal.

3. A divided court of appeals reversed (Pet. App. 1a-33a). The court acknowledged that *Lynch* v. *Donnelly*, *supra*, had to be "the starting point of our analysis" (Pet. App. 7a), but noted that this Court was "sharply divided" in that case and that "the opinion [for the Court] was tied so closely to the facts involved" that it was "unable to put to rest issues involving use of religious decorations at the Christmas season" (*id.* at 8a-9a). Thus, after describing this Court's holding in *Lynch*, the court of appeals proceeded to make its own application of the three-prong test of *Lemon* v. *Kurtzman* to the facts of this case.

The court of appeals focused its discussion on the second prong of the *Lemon* test, noting (Pet. App. 13a) that "a public entity usually is able to articulate some secular purpose for a display (first prong) and the mere placement and storage of a display will involve little entanglement (third prong) of government and religion." With respect to the second prong, the court explained (*id.* at 13a-14a) that a court should consider six separate variables in determining whether a display has the effect of advancing or endorsing religion:

> (1) the location of the display; (2) whether the display is part of a larger configuration including non-religious items; (3) the religious intensity of the display; (4) whether the display is shown in connection with a general secular holiday; (5) the degree of public participation in the ownership and maintenance of the display; and (6) the existence of disclaimers of public sponsorship of the display.

Based on its consideration of these factors, the court concluded (Pet. App. 14a) that "by permitting the creche

and the menorah to be placed at the buildings the city and county have tacitly endorsed Christianity and Judaism and have therefore acted to advance religion." The court noted (*ibid.*) that "[e]ach display was located at or in a public building devoted to core functions of government and each was placed at a prominent site at the public building where visitors would see it." Furthermore, the court stated (*ibid.*), "neither the creche nor the menorah can reasonably be deemed to have been subsumed by a larger display of non-religious items. In addition, both the creche and the menorah are associated with religious holidays and would be viewed as pertaining to a particular religion." Indeed, the court stressed (*ibid.*), "the menorah, unlike the creche, is not associated with a holiday with secular aspects."[4] Finally, the court noted (*ibid.*), "there is public participation, albeit minimal, in both the storage and placement of the displays."[5]

Judge Weis dissented (Pet. App. 16a-33a). He noted that *Lynch* v. *Donnelly* is not only "the starting point of our analysis," but "also ends our analysis" (*id.* at 23a). Judge Weis explained (*id.* at 24a) that the placement of the creche in the county courthouse did not distinguish this case from *Lynch* in which the creche was also displayed "under municipal auspices and encouragement." Judge

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[4] The court of appeals, responding to the district court's finding (Pet. App. 39a) that the menorah "has no particular religious significance," stated (*id.* at 15a) that "regardless of the lack of religious significance of a menorah its sectarian character is clear and thus even though it may not be regarded as a sacred object its placement was an endorsement of religion."

[5] The court of appeals acknowledged (Pet. App. 15a) that "there is a sign near the creche indicating that the display is a donation of the Holy Name Society," but stated that that factor alone "cannot possibly outweigh the considerations which lead us to find that placement of the creche violated the second prong of the *Lemon* test."

Weis also rejected the majority's emphasis on the paucity of secular decorations displayed along with the creche. He concluded that in *Lynch* it was "the December holiday setting"—not the presence of "plastic Santa Clauses or reindeer"—that negated any message of endorsement of the religious content of the display (*id.* at 28a-30a). In any event, Judge Weis noted (*id.* at 29a), this focus on context, "even if valid, is irrelevant here. The Pittsburgh creche was surrounded by traditional Christmas symbols, including wreaths, evergreen trees, and poinsettia plants, and served as a thematic backdrop for the County's traditional holiday choral program." With respect to the menorah, Judge Weis stated (*id.* at 32a) that "[i]ncluding a reference to Chanukah did no more than broaden the commemoration of the holiday season and stress the notion of sharing in its joy. By marking the Judeo-Christian aspects of the holiday season, the local governments appropriately called attention to the great pluralism that is the hallmark of religious tolerance in this country."

SUMMARY OF ARGUMENT

In *Lynch* v. *Donnelly*, this Court held that it did not violate the Establishment Clause for the City of Pawtucket, Rhode Island, to include a government-owned creche in the traditional holiday display that it erected each year in a private park in the heart of the town's shopping district. Pawtucket's display of the creche, the Court concluded, served the legitimate secular purposes of celebrating a national holiday through the use of its traditional symbols and depicting the historical origins of that holiday. The Court acknowledged that a creche has religious significance, but concluded that the principal effect of Pawtucket's display was to engender a friendly community spirit of goodwill in keeping with the holiday

season and that any benefit to religion from the display was merely indirect, remote and incidental.

The court of appeals purported to distinguish *Lynch* in three respects. First, the court emphasized that the nativity scene and the menorah at issue here would be displayed on public property, in buildings devoted to the business of government, while the creche in *Lynch* was on private property. Second, the court concluded that the creche and menorah at issue here were not subsumed by a large display of non-religious items, while the Pawtucket creche was part of a Christmas display including numerous wholly secular symbols of the holiday. Finally, the court held that the menorah was subject to a special constitutional disability because, unlike the creche, it is not associated with a holiday with secular aspects.

None of these distinctions will stand scrutiny. The Court in *Lynch* did not rely in any fashion on the happenstance that Pawtucket's Christmas display was on private land. The Court treated the case, quite properly, as one in which the government was responsible for, and identified with, the government-owned display. The purpose and effect of the display—to celebrate a holiday with the traditional symbols of that holiday and to engender a community spirit of goodwill in keeping with the season—are the same regardless of location. If those government-sponsored purposes and effects are legitimate in a private park in the heart of the shopping district, they do not become illegitimate when shifted down the street to the steps or gallery of a public building. The creche and menorah are passive symbols that do not coerce the belief or compel the obedience of visitors with government business. Nor is any special message of endorsement of religion communicated by the location of the displays. Whatever their precise physical location, it is the

overall holiday setting that changes what viewers may fairly understand to be the purpose of the displays and negates any message of endorsement of the religious content of their constituent symbols.

Since the use of the creche as a symbol of the holiday does not constitute a government endorsement of the religious content of that symbol, the government is not required to surround it with candy canes, reindeer, or other purely secular symbols in order to avoid an Establishment Clause violation. In any event, the creche and the menorah here are each part of larger holiday displays that include numerous purely secular decorations as well as express statements of secular purpose. As in *Lynch*, the displays at issue here suggest no endorsement of either Christianity or Judaism.

As to the court of appeals' conclusion that the menorah is not associated with a holiday having secular aspects, there is no dispute that a menorah is part of the Jewish celebration of Chanukah, which falls each year within the Christmas holiday season. Increasingly, private and governmental entities—from public schools to television stations—are accommodating and recognizing celebrations of Christmas and Chanukah together as part of a general holiday season. An objective observer would thus view Pittsburgh's decision to erect a menorah next to the Christmas tree on the steps of the City-County Building not as endorsing Judaism, but merely as recognizing another dimension of the holiday season. Including a menorah in a holiday display broadens the holiday message from one focused on Christmas alone and serves further to emphasize the absence of any sectarian endorsement.

The court of appeals, in striving to limit *Lynch* narrowly to its facts, thus missed the central message of that decision as well as the harmony of that message with this

Court's Establishment Clause jurisprudence. The Court in *Lynch* recognized that accommodation and acknowledgment of religion do not equal endorsement of religion. Religion is inextricably imbedded in our national culture and our official holidays and ceremonies, and it was never the purpose of the Establishment Clause to secularize our public life so rigidly that we cannot continue to mark our public holidays in a manner that includes traditional acknowledgments of their religious character.

ARGUMENT

THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT DOES NOT PROHIBIT A LOCAL COMMUNITY FROM INCLUDING A NATIVITY SCENE AND A MENORAH IN ITS ANNUAL HOLIDAY DISPLAY

The decision of the court of appeals cannot be reconciled with this Court's recent decision in *Lynch* v. *Donnelly*. The Court in *Lynch* recognized, as it has always recognized, that accommodation and acknowledgment of religion do not equal endorsement of religion. Religion is inextricably imbedded in our national culture and our official holidays and ceremonies, and it was never the purpose of the Establishment Clause to secularize our public life so rigidly that we cannot continue to mark our public holidays in a manner that includes traditional acknowledgments of their religious character.

1. In *Lynch*, this Court held that it did not violate the Establishment Clause for the City of Pawtucket, Rhode Island, to include a government-owned creche in the traditional Christmas display that it erected each year in a private park in the heart of the town's shopping district. The display at issue in that case was "essentially like those to be found in hundreds of towns or cities across the Nation—often on public grounds—during the Christmas season" (465 U.S. at 671). It included, among other items,

a Santa Claus house, reindeer, candy-striped poles, a Christmas tree, colored lights, cut-out figures, a large banner reading "Seasons Greetings," and a creche.

The Court recognized (465 U.S. at 674) that there is an "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789"[6] and stressed (*id.* at 678) that "an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by this Court." While thus emphasizing (*id.* at 679) its "unwillingness to be confined to any single test or criterion in this sensitive area," the Court nonetheless "found it useful" to apply the three-part test of *Lemon* v. *Kurtzman, supra.* The Court accordingly inquired whether the City's display of the nativity scene had a legitimate secular purpose, whether its principal or primary effect was either to advance or to inhibit religion, and whether it created an excessive entanglement of government with religion.

"Pawtucket's display of the creche," the Court noted (465 U.S. at 681), "is sponsored by the city to celebrate the Holiday and to depict the origins of that Holiday. These are legitimate secular purposes."[7] See *id.* at 691

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[6] The Court cited (465 U.S. at 674-677), among "countless" examples of this official acknowledgment, the employment of congressional chaplains to offer daily prayers in Congress, the celebration of Thanksgiving as a national holiday on which to give thanks for the bounties of Nature as gifts from God, the statutorily prescribed national motto "In God We Trust," the inclusion in the Pledge of Allegiance of the language "One nation under God," the declaration each year of a National Day of Prayer, and the commemoration of such occasions as Jewish Heritage Week and the Jewish High Holy Days.

[7] The Court noted that it "has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity

(O'Connor, J., concurring) ("The evident purpose of including the creche in the larger display was not promotion of the religious content of the creche but celebration of the public holiday through its traditional symbols. Celebration of public holidays, which have cultural significance even if they also have religious aspects, is a legitimate secular purpose."). The Court also agreed with both lower courts that no institutional entanglement was occasioned by the display (*id.* at 684).[8]

With respect to the second prong of the *Lemon* test, the Court concluded that, "notwithstanding the religious significance of the creche" (465 U.S. at 687), the primary effect of displaying the creche was not "to confer a substantial and impermissible benefit on religion in general and on the Christian faith in particular" (*id.* at 681). Focusing on "the creche in the context of the Christmas season" (*id.* at 679), the Court noted (*id.* at 683) that "our precedents plainly contemplate that on occasion some advancement of religion will result from governmen-

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was motivated *wholly* by religious considerations." 465 U.S. at 680 (emphasis added). Accord *Bowen* v. *Kendrick*, No. 87-253 (June 29, 1988), slip op. 11 ("a court may invalidate a statute [under this prong] only if it is motivated wholly by an impermissible purpose"); *Wallace* v. *Jaffree*, 472 U.S. 38, 56 (1985) (emphasis in original) (government action is invalid only if it has "*no* secular purpose").

[8] The Court focused its entanglement inquiry on the extent to which the display required "ongoing, day-to-day interaction between church and state," rather than on the potential "political divisiveness" of the display (465 U.S. at 684); see *id.* at 689 (O'Connor, J., concurring) ("In my view, political divisiveness along religious lines should not be an independent test of constitutionality."). "In any event," the Court noted (*id.* at 684), "apart from this litigation, there is no evidence of political friction or divisiveness over the creche in the 40-year history of Pawtucket's Christmas celebration."

tal action,"[9] and concluded (*ibid.*) that "whatever benefit there is [from the display] to one faith or religion or to all religions, is indirect, remote, and incidental." "Even the traditional, purely secular displays extant at Christmas, with or without a creche," the Court noted (*id.* at 685), "would inevitably recall the religious nature of the Holiday." But the principal effect of such displays is to "engender[] a friendly community spirit of goodwill in keeping with the season" (*ibid.*).

In light of our tradition of "accommodation of all faiths and all forms of religious expression" (465 U.S. at 677), the Court stated (*id.* at 686) that "[i]t would be ironic * * * if the inclusion of a single symbol of a particular historic religious event, as part of a celebration acknowledged in the Western World for 20 centuries, and in this country by the people, by the Executive Branch, by the Congress, and the courts for 2 centuries, would so 'taint' the city's exhibit as to render it violative of the Establishment Clause." The Court accordingly concluded (*ibid.*) that "[t]o forbid the use of this one passive symbol—the creche—at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public

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[9] As examples, the Court cited (465 U.S. at 681-682) the expenditure of public money for textbooks supplied to students attending church-sponsored schools, *Board of Education* v. *Allen*, 392 U.S. 236 (1968), and for transportation of students to such schools, *Everson* v. *Board of Education*, 330 U.S. 1 (1947); federal grants for buildings at church-sponsored colleges and universities, *Tilton* v. *Richardson*, 403 U.S. 672 (1971), and other noncategorical grants to institutions of higher education combining secular and religious education, *Roemer* v. *Board of Public Works*, 426 U.S. 736 (1976); tax exemptions for church properties, *Walz* v. *Tax Comm'n*, 397 U.S. 664 (1970); Sunday Closing Laws, *McGowan* v. *Maryland*, 336 U.S. 420 U.S. 420 (1961); release time programs for religious training, *Zorach* v. *Clauson*, 343 U.S. 306 (1952); and the legislative prayers upheld in *Marsh* v. *Chambers*, 463 U.S. 783 (1983).

places, and while the Congress and legislatures open sessions with prayers by paid chaplains, would be a stilted overreaction contrary to our history and to our holdings."

2. The court of appeals focused its own inquiry exclusively on the second prong of the *Lemon* test.[10] In reaching its conclusion that "the city and county have tacitly endorsed Christianity and Judaism and have therefore acted to advance religion" (Pet. App. 14a), the court purported to distinguish *Lynch* v. *Donnelly* in three respects. None of these distinctions, however, will stand scrutiny.

a. First, the court of appeals emphasized (Pet. App. 10a-14a) that the nativity scene and the menorah at issue here would be displayed on public property, in buildings devoted to the business of government, while the creche in *Lynch* was on private property. See also *American Jewish Congress* v. *City of Chicago,* 827 F.2d 120, 126 (7th Cir. 1987) ("the display in this case was located within a government building—a setting where the presence of government is pervasive and inescapable"); *ACLU* v. *City of Birmingham,* 791 F.2d 1561 (6th Cir.), cert. denied, 479 U.S. 939 (1986) (enjoining display of creche on lawn in front of city hall). The Court in *Lynch,* however, did not rely in any fashion on the happenstance that Pawtucket's Christmas display was on private land.[11] The Court

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[10] The court acknowledged (Pet. App. 13a) that "a public entity usually is able to articulate some secular purpose for a display (first prong) and the mere placement and storage of a display will involve little entanglement (third prong) of government and religion." Thus, the court did not disturb findings by the district court that the intention of the city and county was merely "to celebrate the holiday season" and not "to affect anyone's religion" (*id.* at 36a) and that the displays "did not create an excessive entanglement of government with religion" (*id.* at 40a).

[11] Similarly, we do not believe that the Court should rely in this case on the happenstance that both the creche and the menorah are

treated the case, quite properly, as one in which the government was responsible for, and identified with, the government-owned display. 465 U.S. at 680-681; *id.* at 690 (O'Connor, J., concurring). Moreover, the Court expressly analogized the case to the other situations in which acknowledgments of religion take place on public property. 465 U.S. at 671, 674, 676-677.

Pawtucket's display was in a centrally located park, facing the busiest commercial district, 300 feet from City Hall. *Donnelly* v. *Lynch,* 525 F. Supp. 1150, 1154-1156 (D.R.I. 1981). "The display doubtless got more attention there than it would have in Pawtucket's City Hall, for which it was too big anyway." *American Jewish Congress* v. *City of Chicago,* 827 F.2d at 131 (Easterbrook, J., dissenting). Allegheny County and the City of Pittsburgh are similarly entitled to have their Holiday displays in a central and convenient location. Undoubtedly, Allegheny County could have located its chorale program and Christmas display in an empty lot somewhere, but in December in Pittsburgh few might brave the elements to enjoy it.

The secular purposes of each display—"to celebrate the Holiday and to depict the origins of that Holiday" (465 U.S. at 681)—and the secular effects of those displays—"engender[ing] a friendly community spirit of goodwill in keeping with the season" (*id.* at 685)—are the same regardless of location. And if those government-sponsored purposes and effects are legitimate in a private park in the heart of the shopping district, they do not become illegitimate when shifted 300 feet to the steps or gallery

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privately-owned. Regardless of ownership, both the creche and the menorah are part of government-sponsored displays.

of a public building. See *McCreary* v. *Stone*, 739 F.2d 716, 729 (2d Cir. 1984) ("We fail to find substantiality in this asserted private/public land distinction"), aff'd by an equally divided Court, 471 U.S. 83 (1985).

Furthermore, no special constitutional infirmities attend the location of these displays "at or in a public building devoted to core functions of government" (Pet. App. 14a). The creche and the menorah are merely "passive symbol[s]" (*Lynch*, 465 U.S. at 686) that do not in any respect coerce the belief or compel the obedience of visitors with government business. Nor is any special message of endorsement of religion communicated by the location of the displays at or in government buildings. Whatever the precise physical surroundings, "the overall holiday setting changes what viewers may fairly understand to be the purpose of the display—as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content" (*Lynch*, 465 U.S. at 692 (O'Connor, J., concurring)). The display of the creche and the menorah both "serve[] a secular purpose—celebration of a public holiday with traditional symbols" (*id.* at 693). Whether the displays are in a city hall or a city park, the creche and the menorah "cannot fairly be understood to convey a message of government endorsement of religion" (*ibid.*).

b. The court of appeals also attempted to distinguish *Lynch* on the ground that the creche and menorah at issue here could not "reasonably be deemed to have been subsumed by a larger display of non-religious items," while the Pawtucket creche was part of a Christmas display including, inter alia, a Santa Claus house, reindeer pulling Santa's sleigh, a cut-out clown, a Christmas tree, and a talking wishing well (Pet. App. 14a). See also *ACLU* v.

City of Birmingham, 791 F.2d at 1566 (forbidding display of "unadorned creche" not "surrounded by a multitude of secular symbols of Christmas"). But, although this Court in *Lynch* referred to the secular decorations surrounding the creche in that case, the Court made it clear that the relevant context for First Amendment purposes was the "Christmas Holiday season" (465 U.S. at 680), and that within that context it is permissible for the government to acknowledge the historical and religious origins of the season (*id.* at 686). See *McCreary* v. *Stone,* 739 F.2d at 729 ("The Supreme Court did not decide the Pawtucket case based upon the physical context within which the display of the creche was situated; rather, the Court consistently referred to 'the creche in the context of the Christmas season,' * * * or the 'Christmas Holiday season.' ").

The court of appeals trivialized *Lynch* by claiming that the absence of a cut-out clown, reindeer, or talking wishing well must dictate a different result. Important constitutional issues should not turn on marginal differences in holiday displays. "It would be appalling to conduct litigation under the Establishment Clause as if it were a trademark case, with experts testifying about whether one display is really like another, and witnesses testifying that they were offended—but would have been less so were the creche five feet closer to the jumbo candy cane." *American Jewish Congress* v. *City of Chicago,* 827 F.2d at 130 (Easterbrook, J., dissenting). See also *ACLU* v. *City of Birmingham,* 791 F.2d at 1569 (Nelson, J., dissenting) ("I question whether it is appropriate for the federal courts to tell the towns and villages of America how much paganism they need to put in their Christmas decorations"); Pet. App. 30a (Weis, J., dissenting).

The essence of the Court's decision in *Lynch* was that displaying a traditional symbol of a holiday—even if religious in origin and meaning—does not amount to an

endorsement of the religious faith associated with the symbol. 465 U.S. at 683; *id.* at 692 (O'Connor, J., concurring). Pawtucket may display a creche without thereby endorsing Christianity because "the overall holiday setting changes what viewers may fairly understand to be the purpose of the display," and in the context of that setting, the use of a traditional holiday symbol such as a creche "is not understood to endorse the religious content of the holiday, just as government celebration of Thanksgiving is not so understood" (*ibid.*). Since use of the creche as a symbol of the Holiday does not constitute a government endorsement of the religious content of that symbol, the government and the courts are not required to engage in reindeer counting to ensure that there are enough purely secular symbols accompanying the creche.

In any event, even if such a contextual inquiry were warranted, it is clear that "an objective observer" (*Wallace* v. *Jaffree,* 472 U.S. at 76 (O'Connor, J., concurring)) would not view the displays at issue here as an endorsement of either Christianity or Judaism. "[T]he creche was but part of the holiday decoration of the stairwell and a foreground for the high school choirs which entertained each day at noon." Pet. App. 40a. It "merely contributes as part of the overall Christmas scene" (*id.* at 35a), along with red and white poinsettia plants, evergreen trees with red and white bows, Christmas wreaths, and other seasonal decorations throughout the building (*id.* at 3a). Moreover, the nativity scene has a sign in front of it noting that it was donated by a private organization (*ibid.*) thus further distancing Allegheny County from any endorsement of the specific religious content of this traditional holiday symbol. See *Allen* v. *Morton,* 495 F.2d 65, 67-68 (D.C. Cir. 1973) (per curiam).[12] The menorah, located on the steps of the City-

[12] Furthermore, the chorale program that uses the creche as a stage setting is expressly dedicated each year to the universal, secular themes

County Building, is also part of a larger holiday display that includes a large, lighted Christmas tree, signs advertising seasonal events, and traditional decorations in the doorways leading to the interior of the City-County Building. Pet. App. 4a-5a. The secular purpose of both the lighted menorah and the lighted Christmas tree is brought home to the viewer by a large sign exhorting passers by to "Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom" (*ibid.*).

c. Finally, the court of appeals concluded that the menorah was subject to a special constitutional disability because "the menorah, unlike the creche, is not associated with a holiday with secular aspects" (Pet. App. 14a). That is simply not true. The menorah is part of the Jewish celebration of Chanukah, which falls each year within the Christmas holiday season. Increasingly, private and governmental entities—from public schools to television stations—are accommodating and recognizing celebrations of Christmas and Chanukah together as part of a general public holiday season. As in *Lynch*, therefore, "[a]lthough the religious and indeed sectarian significance" of the menorah "is not neutralized by the setting, the overall holiday setting changes what viewers may fairly understand to be the purpose of the display" (465 U.S. at 692 (O'Connor, J., concurring)).

We believe that an objective observer would view Pittsburgh's decision to erect a menorah next to the Christmas tree on the steps of the City-County Building not as endorsing Judaism, but merely as recognizing another aspect of the holiday celebration. Thus, the mere fact that "the menorah is *associated* with Chanukah, a religious holiday"

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of world peace and brotherhood and to the memory of persons missing in action in the Vietnam War. Pet. App. 3a-4a.

(Pet. App. 15a (emphasis added)), is not a sufficient reason to banish it from public celebrations of the holiday season. To the contrary, including a menorah in a holiday display merely broadens the holiday message from one focused on Christmas alone and serves further to emphasize the absence of any sectarian endorsement.[13] Futhermore, the district court found (Pet. App. 39a) that "[t]he Chanukah menorah has no particular religious significance when placed in a public location beyond signifying a 'Light to the World' somewhat like the Christmas message 'Peace on Earth, Goodwill to Men.' " Display of the menorah, therefore, "cannot fairly be understood to convey a message of government endorsement of religion." 465 U.S. at 693 (O'Connor, J., concurring).

3. Jefferson's celebrated reference to a "wall of separation between church and State" may suggest that all governmental acknowledgments of religion must be condemned. But "[i]t has never been thought either possible or desirable to enforce a regime of total separation." *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 760 (1973). Such "total separation" would clearly require an elaborate effort to reshape our practices and rhetoric, one that would betoken "a

[13] We do not, however, agree with petitioner Chabad (88-90 Pet. 10-11) that the City of Pittsburgh is compelled, once it erects a Christmas tree, to include in its display a symbol associated with Chanukah. It is true that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson* v. *Valente*, 456 U.S. 228, 244 (1982). But *Lynch* makes clear that display of the traditional symbols of a national holiday with religious origins does not constitute religious preferment. 465 U.S. at 687 n.13; *id.* at 688 n.* (O'Connor, J., concurring). Thus, no counterbalancing of such a display is required; indeed, it is simply not possible for the government to give uniform recognition to all religions in the context of commemorating a holiday with specific meaning for one or more religions.

brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious." *Abington School Dist.* v. *Schempp,* 374 U.S. 203, 306 (1963) (Goldberg, J., concurring). But hostility toward religion is as prohibited by the Constitution as is government establishment of religion. See, *e.g., Lynch,* 465 U.S. at 673; *Zorach* v. *Clauson,* 343 U.S. at 314; *McCollum* v. *Board of Education,* 333 U.S. at 211-212.

The court of appeals, in striving to limit *Lynch* narrowly to its facts, missed the central message of that decision and the harmony of that message with this Court's Establishment Clause jurisprudence. The Court in *Lynch* recognized, as it has always recognized, that accommodation and acknowledgment of religion do not equal endorsement of religion. Our nation is not secular, but pluralistic, and there is nothing wrong with the government attempting to recognize and commemorate the importance of religion in America's historical traditions and cultural heritage. *Lynch,* 465 U.S. at 678. Such recognition constitutes "simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh* v. *Chambers,* 463 U.S. at 792.

There are "countless * * * illustrations of the Government's acknowledgment of our religious heritage and governmental sponsorship of graphic manifestations of that heritage." *Lynch,* 465 U.S. at 677. The creation and maintenance of legislative chaplaincies, and the frequent invocation of God's blessing on all of the Nation's public and ceremonial occasions (see n.6, *supra*), demonstrate the untenability of any suggestion that the government is not free to acknowledge and help commemorate an occasion such as Christmas or Chanukah or that, in doing so, it must somehow contrive to conceal and ignore the religious aspects of these holidays. To state that the government may not prefer one religion over another does

not mean that the government must pretend that certain holidays have no specific meanings to different religions.

What is forbidden under the Establishment Clause are those government practices that coerce religious orthodoxy (*e.g.*, *Stone* v. *Graham*, 449 U.S. 39, 42 (1980)) or that involve the government directly in religious exercises (*e.g.*, *Abington School Dist.* v. *Schempp*, 373 U.S. at 223-224). For the government to participate in holiday celebrations that have religious as well as secular elements, and in that context to acknowledge our religious heritage, is neither a "religious exercise" nor an interference with the rights of conscience of nonbelievers.[14] Religion is inextricably imbedded in our national culture and our official holidays and ceremonies. It pervades our public as well as our private lives because of our history and because recognition of this aspect of our history is of deep concern to many of our people. To ignore this heritage and this deeply felt concern by eradicating all evidence of its influence would be to substitute "callous indifference" for "benevolent neutrality." *Zorach* v. *Clauson*, 343 U.S. at 314; *Walz* v. *Tax Comm'n*, 397 U.S. at 669.

In grappling with the difficult and sensitive constitutional questions in this area, the courts must demonstrate "the ability and willingness to distinguish between real threat and mere shadow." *Abington School Dist.* v. *Schempp*, 374 U.S. at 308 (Goldberg, J., concurring). It is simply not plausible to suggest that the display of a nativity scene or a menorah for several weeks during the holiday

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[14] The district court found that there was no element of coercion in either of the displays at issue here. "[N]one of the people who enter the Courthouse are required to do anything; they are not required to read, or to sing, or to pause or to reflect. Neither are people required to pause or look or read or make any gestures where the menorah is concerned; they are merely displays." Pet. App. 35a.

season is "but the 'foot in the door' or the 'nose of the camel in the tent' leading to an established church." *Walz*, 397 U.S. at 678. If government celebrations of our religious heritage "can be seen as the first step toward 'establishment' of religion, * * * the second step has been long in coming. Any move that realistically 'establishes' a church or tends to do so can be dealt with 'while this Court sits' " (*ibid.*). In the meantime, "[a]ny notion that these symbols pose a real danger of establishment of a state church is farfetched indeed." *Lynch*, 465 U.S. at 686.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

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QUESTION PRESENTED

Does the Establishment Clause prohibit local governments from the exhibition of religious symbols as holiday displays if the displays are located on public land and are not subsumed by other non-religious symbols?

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INTEREST OF THE AMICUS CURIAE

The City of Warren ("Amicus Curiae") is a municipal corporation in the State of Michigan. For many years, the City of Warren has erected a holiday display on the front lawn of the Warren City Hall during the month of December, which includes a creche, menorah, Star of David, toy soldiers, a snowman, candles, and stars. In response to a lawsuit challenging the religious components of the display as a violation of The Establishment Clause of the U.S. Constitution, U.S. District Judge James Harvey, on October 20, 1988, denied a motion for a preliminary injunction to preclude inclusion of the creche and the menorah in the holiday display. *Jane Doe, et al.* v. *The City of Warren*, slip op., Civil Action No. 87-30084, (E.D. Mich, 1988). Judge Harvey ruled specifically that the inclusion of the creche, the menorah, and the Star of David in the display was constitutionally permissible. Despite this favorable result, the City of Warren believes that the present case before this Court may very well determine whether the City may continue its long-established practice of acknowledging the origins of the Christmas and Hanukkah Holidays. The City's firm conviction is that the inclusion of these symbols in its holiday display in no way places its imprimatur on any particular religious belief.

STATEMENT OF THE CASE

Amicus Curiae adopts and incorporates by reference the statement of the case appearing in the brief submitted by the petitioner, City of Pittsburgh.

SUMMARY OF THE ARGUMENT

The Court of Appeals should be reversed for its refusal to apply the principles already established by this Court in

Lynch v. *Donnelly*. Rather than follow the guideposts established by this Court in *Lynch* v. *Donnelly*, the Court of Appeals attempted to carve out a new and contrary course through the constitutional landscape. This Court should repudiate such attempts by lower courts to ignore the dictates of *Lynch* under the guise of artificial factual distinctions.

However, should this Court depart from the reasoning of its prior rulings and hold that religious holiday displays, standing alone, do not pass constitutional muster, Amicus Curiae would urge the Court not to preclude local governments from celebrating major holidays through the use of displays containing both religious and non-religious components, as was involved in the *Lynch* case. Otherwise, a blanket ban on the use of religious symbols in holiday displays on public property would convey an unfortunate message of government hostility toward religion.

I.

THE COURT OF APPEALS' REFUSAL TO APPLY THE PRINCIPLES ESTABLISHED IN LYNCH REQUIRES REVERSAL.

The Court of Appeals in this case offered little more than a token glance at this Court's decision in *Lynch* v. *Donnelly*, 465 U.S. 668 (1984). Instead, the Court of Appeals seized upon artificial factual distinctions as a means to ignore the clear dictates of the *Lynch* decision. The Court of Appeals' primary stated justification for sidestepping *Lynch* was two purported factual "distinctions": 1) the location of the creche and menorah at or near a public building devoted to the core functions of government and 2) the fact that neither the creche nor the menorah were "subsumed by a larger display of non-religious items." *American Civil Liberties Union* v. *County of Allegheny, et al.*, 842 F.2d 642, 655 (3rd Cir.

1988). A careful reading of *Lynch* and this Court's other Establishment Clause cases makes evident that neither of these purported factual "distinctions" precludes the petitioners from continuing their laudable efforts to acknowledge the religious heritage of their community.

A. The Lynch Case: The Facts, the Holding and the Establishment Clause Test Applied.

The *Lynch* case involved a city-owned holiday display located in a private park in the heart of the city's shopping distict. *Lynch*, 465 U.S. at 671. The display included a creche and a number of other non-religious symbols. *Id.* This Court held in *Lynch* that the city's use of the creche in the display was a permissible means for the city to acknowledge the religious origins of Christmas in a manner which did not violate the Establishment Clause of the First Amendment. *Lynch*, 465 U.S. at 681–687.

Though applying the familiar tnree-part *Lemon* test often used by this Court in Establishment Clause cases,[1] the Court in *Lynch* emphasized that its central concern in such cases was whether "in reality", the challenged official conduct "establishes a religion or religious faith, or tends to do so." *Lynch*, 465 U.S. at 678. In a concurring opinion, Justice O'Connor also noted that an appropriate concern was whether or not the challenged government conduct conveyed a message of government endorsement or disapproval of religion. *Lynch*, 465 U.S. at 688–694.[2]

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[1] The three requirements of the *Lemon* test are as follows:

> First, the [governmental conduct] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . ; finally, the [conduct] must not foster 'an excessive government entanglement with religion.'

Lemon v. *Kurtzman*, 403 U.S. 602, 612–613 (1971).

[2] In other contexts, Justice O'Connor has stated that the relevant test is whether an "objective observer" would view the government's conduct as conveying a message of endorsement of a religion or a particular religious belief. *Wallace* v. *Jaffree*, 472 U.S. 38, 76 and 83 (1985); *Corporation of the Presiding Bishop* v. *Amos*, 483 U.S. ____; 97 L.Ed.2d 273, 291 (1987).

B. The Private Land/Public Land Distinction Was Irrelevant to the Lynch Analysis and Constitutes an Improper Basis for Departing From the Lynch Decision.

The Court of Appeals attempted to distinguish *Lynch* by focusing on the fact that the creche and menorah were located on public land. This decision of the Court of Appeals ignores the holding and rationale of *Lynch* on several points. First, the *Lynch* decision was written with the understanding that the City of Pawtuckett display was "essentially like those to be found in hundreds of towns or cities across the Nation — *often on public grounds* — during the Christmas season." *Lynch*, 465 U.S. at 671 (emphasis added). It is abundantly clear that Court of Appeals' reliance upon the public land /private land distinction was more a result of an obedient reading of Justice Brennan's dissenting opinion in *Lynch* than close scrutiny of the analysis of this Court's opinion in that case.

Second, this Court's heavy reliance upon the *Marsh* case[3] in its *Lynch* decision dispels any notion that the location of the creche and menorah in or near a government building is sufficient excuse to ignore the *Lynch* decision. In *Marsh*, this Court held that the legislative practice of hiring a legislative chaplain who opened each session of the Nebraska legislative with prayer did not violate the Establishment Clause. In *Lynch*, Chief Justice Burger's opinion referred directly or indirectly to the *Marsh* opinion no less than seven times. *Lynch*, 465 U.S. at 674, 679, 682–683, 685–687. In addressing the "effect" prong of the *Lemon* test, the only prong of the test the petitioners were found to have violated in this case,[4] 842 F.2d at 662, the *Lynch* Court held that the creche display conferred no more benefit upon religion, than "the legislative prayers upheld in *Marsh* v. *Chambers*". *Lynch*, 465 U.S. 668, 681–682. In its concluding remarks in *Lynch*,

[3] *Marsh* v. *Chambers*, 463 U.S. 783 (1983).

[4] Since the Court of Appeals did not rule on whether the first or third prongs of the *Lemon* test were violated, this brief will not address them.

this Court did not hesitate to use the *Marsh* case as a benchmark for testing the constitutional validity of government-sponsored religious displays:

> To forbid the use of this one passive symbol — the creche — at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, and while the Congress and legislatures open sessions with prayers by paid chaplains would be a stilted overreaction contrary to our history and to our holdings. If the presence of the creche in this display violates the Establishment Clause, a host of other forms of taking official note of Christmas, and of our religious heritage, are equally offensive to the Constitution.

Lynch, 465 U.S. at 686.

It strains credibility to believe that a privately-owned creche or menorah displayed in or near a government building represents a greater danger of state-established religion than a legislative chaplain. If an "objective observer"[5] would perceive no message of government endorsement of a particular religious belief in a legislative chaplain offering Judeo-Christian prayers[6] from the same legislative chambers from which legislative debates are held then surely that same observer would perceive no such government endorsement in the silent display of the creche and menorah in the entrance of the Allegheny County Courthouse or on the steps of the Pittsburgh City-County Building.[7] Given any different perception, one might question the observer's need for corrective lens.

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[5] Wallace, 472 U. S. at 76 and 83; *Amos*, 97 L Ed 2d at 291 (O'Connor J., concurring)

[6] See *Marsh*, 463 U.S. at 793.

[7] The appearance of government endorsement of religion is certainly further diminished by the fact that the creche and the menorah are privately owned and, at least in the case of the creche, are identified as such. Cf. *Widmar* v *Vincent* 454 U. S. 263, 273–275 (1981); *McCreary* v *Stone*, 739 F.2d 716, (2d Cir. 1984) aff'd by equally divided court sub nom *Bd. of Trustees of Village of Scarsdale* v *McCreary*, 471 U.S. 83 (1985); *Smith* v *Lindstrom*, slip op. Civil Action No. 87-0068C (W.D. Va. 1987) (denying injunction against privately owned creche display on lawn of County Office Building.)

In the present case, mention of the *Marsh* decision is conspicuously absent from the Courts of Appeals' criticism of the symbolic union of "City Hall" and religious symbols. 842 F.2d at 660–662.[8] The Court of Appeals' failure to address *Marsh* was no doubt one of the several reasons for its erroneous conclusions.

Third, this Court in *Lynch* cited many other examples besides legislative chaplains where government has acknowledged our religious heritage and sponsored "graphic manifestations of that heritage." *Lynch*, 465 U.S. at 677. The Court's illustrative list included the designation of Thanksgiving as a national holiday and subsequent presidential Thanksgiving proclamations, the congressionally-mandated use of "In God We Trust" on U.S. coins, the exhibition of hundreds of religious paintings in The National Gallery, the use of the phrase "One Nation Under God" in our Pledge of Allegiance, the congressionally-mandated proclamation of a National Day of Prayer each year, and Presidential Proclamations commemorating Jewish Heritage Week and the Jewish High Holy Days. *Lynch*, 465 U.S. at 675–677. In almost all of these examples the government acknowledgment of religion took place either in a government building or emanated directly from a government actor.

Fourth, the private land versus public land distinction might carry more weight if this Court in *Lynch* had treated the placement of the creche in a private park as transforming *government* sponsorship of the creche into merely *private* sponsorship. However, the creche in *Lynch* was treated unequivocally by this Court as a *government-sponsored* display. That display was placed in a "central and highly visible location" in the heart of the shopping district. *Lynch*, 465 U.S. at 671; *Lynch* 465 U.S. at 706 (Brennan J., dissenting). There was no

[8] Discussion of the *Marsh* case is likewise conspicuously absent from the other Court of Appeals' decisions which have held invalid, on Establishment Clause grounds, creche displays in or near public buildings devoted to core governmental functions. See e.g. — *American Civil Liberties Union* v. *City of Birmingham*, 791 F. 2d 1561 (6th Cir.), cert. den. 479 U.S. 939 (1986); *American Jewish Congress* v. *City of Chicago*, 827 F.2d 120 (7th Cir. 1987).

suggestion in *Lynch* that the creche was perceived as a private display because of its location in a private park. Neither was there any hint in *Lynch* that government may acknowledge our religious heritage only if the public might be under the mistaken impression that a religious display was sponsored by a private party.

To the contrary, the *Lynch* Court merely condoned the creche display as one of many constitutionally permissible ways in which government may acknowledge our rich religious heritage. The geographical location of the religious display was all but irrelevant to the *Lynch* analysis of the constitutional validity of the display. Furthermore, this Court's reliance on *Marsh* and other similar examples makes evident that the location of a religious display in or near a governmental building would in no way diminish its permissibility.

Fifth, the Court of Appeals in this case gave microscopic scrutiny to the possible perception of government endorsement of the creche and the menorah. No scrutiny was given to the message conveyed by a ban on the use of religious symbols in holiday displays in or near government buildings. Amicus Curiae is not alone in its belief that the tragic message that would be drawn from such a ban would be government hostility toward religion. *See e.g. — Citizens Concerned for Separation of Church and State* v. *City and County of Denver*, 526 F.Supp. 1310, 1314 (D. Colo. 1981).

II.

WHILE THE FACT THAT THE CRECHE AND MENORAH WERE NOT SUBSUMED BY NON-RELIGIOUS ITEMS IN THE DISPLAY DOES NOT AFFECT THE CONSTITUTIONALITY OF THE DISPLAY UNDER LYNCH, IF THE COURT HOLDS OTHERWISE, IT SHOULD NOT EXTEND ITS RULING TO DISPLAYS WHICH INCLUDE SECULAR SYMBOLS AS WELL.

The Court of Appeals attempted to distinguish *Lynch* on the basis that the creche and menorah were not "subsumed by a larger display of non-religious items." 842 F.2d at 662. This adorned/unadorned distinction has been lampooned as a "Two Plastic Reindeer" rule or a "St. Nicholas, too" test which requires the courts to determine how many secular items in a holiday display are sufficient to neutralize the religious aura of the religious component of the display. 842 F.2d at 668–669 (Weiss J., dissenting) (citations omitted). The *Lynch* case does not require that any such determination be made. This Court should reject the suggestion that local governments must surround religious displays with secular symbols in order to legitimately acknowledge our religious heritage.

In the *Lynch* case, this Court refused to limit its focus to the components of the holiday display itself but rather viewed the creche display in the broader context of the Christmas season. This court stated in *Lynch* that "the focus of our inquiry must be on the creche in the context of the Christmas season." *Lynch*, 465 U.S. at 679 (citations omitted). The Court's focus in *Lynch* was broad enough to take into account public efforts in celebrating Christmas beyond those taken by the government entity sponsoring the religious display:

> To forbid the use of this one passive symbol — the creche — *at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places*, and while the Congress and

> legislatures open sessions with prayers by paid chaplains would be a stilted overreaction contrary to our history and to our holdings. If the presence of the creche in this display violates the Establishment Clause, a host of other forms of taking official note of Christmas, and of our religious heritage, are equally offensive to the Constitution.

Lynch, 465 U.S. at 686 (emphasis added).

This Court's analysis in *Lynch* indicates that the widespread public celebration of both the secular and religious aspects of Christmas contributed to the fact that the display of the creche resulted in only an "indirect, remote and incidental" benefit to religion. *Lynch*, 465 U.S. at 683. Justice O'Connor, in her concurring opinion, also noted that the "overall holiday setting," though not neutralizing the religious content of a religious display, "negates any message of endorsement." *Lynch*, 465 U.S. at 692.

Similarly, in the present case, the creche, when viewed in the context of the holiday season and the county-sponsored Christmas carol programs with their secular and religious carols, benefitted religion in only an "indirect, remote, and incidental" fashion. *Id.*, See also 842 F.2d at 657. The fact that the creche or the menorah is "identified with one religious faith" does not render either display constitutionally infirm any more so that the choice of a legislative chaplain from one denomination or the codification of the Sunday Closing Laws. [9] *Lynch*, 465 U.S. at 685–686.

The notion that a government's decision to symbolically acknowledge a particular religion's heritage requires simultaneous acknowledgement of sufficient secular symbols to neutralize the potential religious impact of those symbols runs contrary to the numerous examples offered by this Court in *Lynch* reflecting government acknowledgement of our

[9] See *Marsh*, 463 U.S. at 763 ("we cannot . . . perceive any suggestion that choosing a clergyman of one denomination advances the beliefs of a particular church"). See also *McGowan* v. *Maryland*, 366 U.S. 420 (1961).

religious heritage and governmental sponsorship of graphic manifestations of that heritage. *Lynch*, 465 U.S. at 674–678. For example, if such "neutralization" efforts were truly required, then it would be necessary to drape legislative chaplains with some sort of secular paraphernalia or a sandwich sign disclaimer to vitiate the potential religious impact of their prayers. Given our country's history and this Court's holdings, local governments should not be required to engage in such attempts to cover up the religious origins of some of the holidays our country recognizes and celebrates.

Amicus Curiae believes that while, under this Court's prior holdings, the addition of secular symbols to religious holiday displays is not necessary to pass constitutional muster, it would be preferable for this Court to require the addition of secular symbols than to preclude completely the use of any religious symbols in holiday displays on public property. A total ban on the use of religious symbols in holiday displays on public property would be widely perceived in communities like Warren, Michigan and other similar communities as government hostility toward religion, not government neutrality. See, e.g. — *Citizens Concerned for Separation of Church and State* v. *City and County of Denver*, 526 F.Supp. 1310, 1314 (D.Colo., 1981). The alienation of citizens whose religious heritage must be systematically ignored in favor of purely secular symbols in government holiday displays is no less intense than that of citizens who feel some discomfort with the presence of religious symbols in such displays. The perceived effect of such a systematic exclusion of religious symbols is that of government "preferring those who believe in no religion over those who do believe." *Zorach* v *Clauson*, 343 U.S. 306, 314 (1952). Religious tolerance is chilled, not engendered, when government shows such "callous indifference" toward religion. *Lynch*, 465 US at 673 (citations omitted).

Amicus Curiae concedes that for some the addition of non-religious symbols to holiday displays may mitigate their perception of government endorsement of religion. The City

of Warren, like many other communities with holiday displays containing both religious and non-religious components, would gladly retain the non-religious symbols as a reasonable accommodation of those who perceive improper government sponsorship of religion in religious displays standing alone.

CONCLUSION

Accordingly, Amicus Curiae urges this Court to reverse the judgment of the Court below.

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CONSENTS

Written consent of all parties to this case have been obtained by Amicus Curiae, the originals of which accompanied the filing of this brief.

(8) (7) (7)

Nos. 87-2050, 88-90, 88-96

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

COUNTY OF ALLEGHENY, *et al.*,
Petitioners,

v.

AMERICAN CIVIL LIBERTIES UNION
GREATER PITTSBURGH CHAPTER, *et al.*,
Respondents.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

Nos. 87-2050, 88-90, 88-96

COUNTY OF ALLEGHENY, *et al.*,
Petitioners,

v.

AMERICAN CIVIL LIBERTIES UNION
GREATER PITTSBURGH CHAPTER, *et al.*,
Respondents.

BRIEF *AMICUS CURIAE* OF CONCERNED WOMEN FOR AMERICA IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE IN THIS CASE

Concerned Women for America ("CWA") is a national, non-profit membership organization with approximately 500,000 members. CWA's purpose is as follows:

> The purpose of CWA is to preserve, protect and promote traditional and Judeo-Christian values through education, legal defense, legislative programs, humanitarian aid, and related activities which represent the concerns of men and women who believe in these values. . . .

We are concerned about the potential loss of religious freedom due to increased government intervention.

We would like to see the preservation of religious freedoms as provided in the United States Constitution.

Concerned Women for America supports the position of the petitioners that the public display of the menorah, the creche, and the Christmas tree on public and/or governmental premises is permitted under the Constitution. Concerned Women for America urges this Court to adopt the analysis of dissenting Judge Weiss, Petition for Certiorari at 25a, and to reverse the decision of the U.S. Court of Appeals for the Third Circuit.

SUMMARY OF ARGUMENT

The court below determined that displaying a creche, menorah, or Christmas tree on public property during the holiday seasons was unconstitutional. Its reasoning ignored this Court's precedent, history, and the intention of the Framers. None of those authorities prohibits display on public grounds of symbols with religious meaning. History, which mirrors intent, includes various forms of religious symbols and other religious expression by all three branches of government, much greater than the simple display of symbols currently under contention before this Court. Religious symbols are not limited to physical symbols such as menorahs, but include symbolic messages such as Thanksgiving proclamations, legislative chaplain's prayers, and expenditures with inherent symbolic meaning such as congressional grants to religious hospitals and Native American reservation churches.

The intent of the Framers was not to exclude religion wholly and rigidly from our public occasions. Excising

religion from our public commemorations is not only not required by the Constitution, but runs contrary to this Court's instructions that government should "accommodate the public service to [this Nation's] spiritual needs." *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952). A basic part of those needs is public and private display of our religious heritage along with other cultural legacies.

If this Court should find that these displays are unconstitutional, then it will inevitably invite turbulent litigation throughout the nation concerning a host of governmental practices and national monuments that reflect our religious heritage. The historical and constitutional foundation of this country rests on the premise that religion and its multifarious forms of symbolic expression should be accommodated rather than expunged.

ARGUMENT

I. THE HISTORICAL EVIDENCE SHOWS THAT THE FIRST AMENDMENT WAS NOT INTENDED TO CENSOR GOVERNMENTAL ACKNOWLEDGMENT OF THE RELIGIOUS PART OF OUR NATION'S HERITAGE.

The Court has long recognized that the Establishment Clause does not restrict governmental recognition of the nation's "religious heritage." *Zorach* v. *Clauson*, *supra* at 312-13 (1952). Much of that permissable acknowledgment of "religious heritage" involved religious symbols and other public religious expression that is far more questionable than the tree, creche, and menorah in this case.

A. The Climate Of Our Revolutionary Government Prior To The Framing Of The First Amendment Was One Of Strong Governmental Recognition Of Our Religious Heritage And Religious Life.

The focus of the constitutional era was not the eradication of religion from public life, or even its mere toleration

in public and private life. Instead, it was to ensure that religious values be allowed free exercise without compelling exercise contrary to conscience. As Justice Joseph Story noted, the intent of the revolutionary government in relation to the framing of the First Amendment of the Constitution was to allow freedom of religious expression:

> The real object of the First Amendment was not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government. It thus cut off the means of religious persecution (the vice and pest of former ages), and of the subversion of the rights of conscience in matters of religion which had been trampled upon almost from the days of the Apostles to the present age. . . .

2 J. Story, *Commentaries on the Constitution of the United States* § 1847, at 593 (2d ed. 1851). Thus, the religion clauses were designed to prohibit the exclusive advancement of any Christian denomination by forbidding exclusive privileges to any one sect. This intent in the framing of the First Amendment was an indicator of the positive sentiment in the revolutionary era for free religious expression. Religion, by virtue of history and tradition, was so enmeshed in American culture that the Establishment Clause could not, even if that were the desired result, entirely sever government from religion.[1] In the words of the late Judge Charles Fahy, "[t]he climate

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[1] As Justice Jackson stated in *McCollum* v. *Bd. of Ed.*, 333 U.S. 203, 236 (1948), "The fact is that for good or ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity . . . and other faiths. . . ."

of the American revolutionary period, including the period of constitutional development, was fundamentally religious." Fahy, *Religion, Education and the Supreme Court*, 14 Law & Contemporary Problems 73, 77 (1949).

Not only were the Framers of the Constitution concerned that religious expression, freedom and education be accommodated, they saw it as vital to the health of the nation. This was most clearly demonstrated in the passage of the Northwest Ordinance of 1787 by a Congress composed of most of the drafters of the Constitution and First Amendment, and reenacted in 1789 by the same Congress that wrote the First Amendment. It reads,

> No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments, in said territory. Religion, morality, and knowledge being essential to good government and happiness of mankind, schools and the means of education shall forever be encouraged.

Ord. of 1787, July 13, 1787, Art. 3, reprinted in *Documents Illustrative of the Formation of the Union of American States* 52 (1927). Private (mostly religious) schools were to be encouraged, as in the Northwest Ordinance, because they promoted "religion, morality, and knowledge."

Religious expression was also encouraged in the Continental Congress through a symbolic opening prayer delivered by a chaplain. 1 *Journals of the Continental Congress* 26 (Washington ed. 1828). Contrary to the assertion that the historical intent of the First Amendment was to secularize the nation (in the pursuit of freedom for all), many of the states participating in the Continental Congress had laws outlawing blasphemy of the deity. In 1788, Oliver Ellsworth of Connecticut, who

represented that state at the Constitutional Convention and the First Congress, and later became Chief Justice of the United States, wrote that civil authority has the right to pass laws against "blasphemy and professed atheism." *Essays on the Constitution of the United States* 171 (Ford ed. 1892). Also, as another example of the encouragement of symbolic expression during this period, most states from independence until the Bill of Rights encouraged wo: ship by observing a symbolic sabbath day in their Sunday closing laws. *See, e.g., Independent Chronicle of Boston* (Nov. 16 1780); *New Jersey Acts of 1790* (June 12, 1790).

Perhaps one of the most symbolic acts taken by the Continental Congress was in relation to the Bible. On September 12, 1782, the Continental Congress by formal resolution recommended for purchase the first edition of Scriptures by John Aitken. This was just five years after the Congress had recommended the importation of twenty thousand Bibles. J. Hall, *History of the Presbyterian Church in Trenton* 329 (1859).

Given the Framers' disposition toward religious expression, no matter the form, it is inconceivable that the removal of religious symbols from public forums in present-day America would fulfill their intentions.

B. The Historical Context Of The Establishment Clause Supports Public Recognition Of Our Religious Heritage.

1. This Court Has Historically Held Governmental Involvement With Religious Expression To Be Constitutional.

In *Quick Bear* v. *Leupp*, 210 U.S. 50 (1908), this Court ruled against a party who desired to restrain the federal government from paying money to a Native American

tribe planning to use the funds for a Catholic school.[2] The Court held that the government was fulfilling its treaty obligations by acting essentially as a trustee over public funds for private disbursal. 210 U.S. at 80. Chief Justice Fuller affirmed the constitutionality of such practices by quoting directly from the decision of the lower court,

> The 'treaty' and 'trust' moneys are the only moneys that the Indians can lay claim to as a matter of right; the only sums on which they are entitled to rely as theirs for education; and while these moneys are not delivered to them in hand, yet the money must not only be provided, but be expanded for their benefit, and in part for their education; it seems inconceivable that Congress shall have intended to prohibit them from receiving religious education at their own cost if they desire it; such an intent would be one to prohibit the free exercise of religion amongst the Indians, and such would be the effect of the construction for which the complaints contend.

210 U.S. at 81. The Catholic schools supported in *Quick Bear* were run by priests and nuns. Their symbolic frocks and habits, and the religious symbols which were affixed to the walls of the schools were explicitly religious, yet not constitutionally infirm. It is also evident from the quotation above that the congress as well as this Court were aware of the symbolic importance of such funding.

By Act of Congress of August 7, 1864, $30,000 was appropriated for the construction of additions to a sectarian hospital ("Providence" hospital) in the District of Columbia. 13 Stat. 43 (1864). While addressing the constitutionality of such an appropriation, this Court in *Bradfield* v. *Roberts* 175 U.S. 291, 298 (1899), acknowledged

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[2] Earlier financial support of religion among Native Americans is summarized in Section B(5) herein.

that the Roman Catholic church exercised a "great and perhaps controlling influence over the management of the hospital." Despite the religious symbols that doubtlessly adorned the hospital and their inherent religiousity, this Court found that the hospital's overriding concern for care of the sick and infirm to be a sufficient secular purpose to withstand scrutiny under the First Amendment. 175 U.S. at 299-300.

In *Church of the Holy Trinity* v. *United States*, 143 U.S. 457 (1892), this Court held that an act of Congress, which was designed to curtail the burgeoning influx of unskilled labor immigrants, was not applicable to a contract between a church and an English minister working in the United States. In holding that the statute was inapplicable to a pastor, Justice Brewer wrote for the Court that America "is a religious nation" and then noted several forms of symbolic religious expression which had historically been held to be constitutional:

> If we pass upon these matters to a view of American life as expressed by its laws, its business, its customs and its society, we find everywhere a clear recognition of the same truth. Among other matters note the following: The form of oath universally prevailing, concluding with an appeal to the Almighty; the custom of opening sessions of all deliberative bodies and most conventions with prayer; the prefatory words of all wills, "In the name of God, amen;" the laws respecting observance of the Sabbath, with the general cessation of all secular business, and the closing of courts, legislatures, and other similar public assemblies on that day. . .

143 U.S. at 471. Religious symbolism and other forms of public religious expression are part of the national heritage. Such expression cannot now be declared unconstitutional because of the desires of a few to level out the

national landscape to a secular common denominator. This was not the intent of the Framers, nor in the present day is it the desire of the American people.[3]

2. This Nation's Presidents Have Approved The Constitutionality Of Symbolic Religious Acts And Proclamations, Which This Court Has Upheld.

Both before and after the drafting and enactment of the First Amendment, governmental acknowledgment of a Supreme Being was a naturally accepted feature of American public life. The Framers of the Constitution and government officials invoked the name of God, asked his blessings upon our Nation, and encouraged our people to do the same. The Framers actively participated in official governmental action sanctioning religious symbols and activities having a far less incidental religious effect than the mere display of a creche, Christmas tree, or menorah.

In September 1774, the delegates of the first session of the Continental Congress resolved on the second day of proceedings to open the next day's meeting with a prayer by an invited clergyman. 1 *Journals of the Continental Congress* 26 (1774) After a few selected appointments to the position of congressional chaplain, the Continental Congress decided that chaplains should be elected

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[3] As this Court stated regarding such symbolic religious expression in *Engel* v. *Vitale*, 370 U.S. 421, 435 n.21 (1962),

> There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God.

annually. 27 *Journals of the Continental Congress* 683 (1784).

When George Washington was inaugurated as our first President, he went, accompanied by both Houses of Congress, to St. Paul's Chapel in New York City for a concluding divine service conducted by the first Episcopal Bishop of New York. *See*, A. Stokes & L. Pfeffer, *Church and State in the United States* 87 (rev. 1st ed. 1964). The decision to hold the service was the product of a joint resolution adopted by both houses of Congress. *Ibid.* Similarly, the First Congress, which drafted and adopted the First Amendment, simultaneously retained chaplains to offer public prayers at the beginning of each legislative day. 1 *Journal of the Senate*, 1st Cong., 1st Sess. 10 (1789); 1 *Journal of the House of Representatives*, 1st Cong., 1st Sess. 11-12 (1789); Act of September 22, 1789, ch. 17, Section 4, 1 *Stat.* 71 (1789); *see also Marsh* v. *Chambers*, 463 U.S. 783 (1983).

Symbolic proclamations were issued by various presidents for thanksgiving, prayer, and fasting. These symbolic presidential declarations were fraught with religious reference and held more symbolic sway and import with the country at that time than any religious symbol sitting on the sidewalk may have today. Congress first proposed a joint resolution on September 24, 1789, which was intended to allow the people of the United States an opportunity to thank "Almighty God" for His many blessings on the American people. This proclamation was submitted to the president the very day after the Congress had voted to recommend to the states the final text of what was to become the First Amendment to the Constitution.

A portion of President Washington's Proclamation for a National Thanksgiving on October 3, 1789, illustrates the figurative religious importance of the occasion:

> Whereas it is the duty of all nations to acknowledge the providence of Almighty God, to obey His will, to be grateful for His benefits, and humbly to implore His protection and favor; and
>
> Whereas both Houses of Congress have, by their joint committee, requested me "to recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God, especially by affording them an opportunity peaceably to establish a form of government for their safety and happiness:"
>
> Now therefore, I do recommend and assign Thursday, the 26th day of November next, to be devoted by the people of these States to the service of that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be; that we may then all unite in rendering unto Him our sincere and humble thanks for His kind care and protection of this country previous to becoming a nation. . .

1 *Messages and Papers of the Presidents* 56 (J. Richardson ed. 1897) (hereinafter cited as J. Richardson). The peoples' reaction to presidential proclamations of this type was not minimal. John Adams described one such fasting day proclamation to his wife Abigail Adams:

> We have appointed a Continental fast. Millions will be upon their Knees at once before their Great Creator, imploring His Forgiveness and blessing: His smiles on American Councils and arms.

A. Stokes & L. Pfeffer, *supra* at 83. The desired effect of these symbolic proclamations then was plainly not mere commemoration of an event, but to encourage the general populace (if they were so religiously inclined) to enter into

a religious observance.[4] President John Adams' Proclamation of March 2, 1799, just after the ratification of the Establishment Clause, was unequivocal in its intent to evoke a response from the American people, stating in part,

> For these reasons I have thought proper to recommend, and I do hereby recommend accordingly, that Thursday, the 25th day of April next, be observed throughout the United States of America as a day of solemn humiliation, fasting, and prayer; that the citizens on that day abstain as far as may be from their secular occupations, devote the time to the sacred duties of religion in public and in private; that they call to mind our numerous offenses against the Most High God, confess them before Him with sincerest penitence, implore his pardoning mercy, through the Great Mediator and Redeemer, for our past transgressions, and that through the grace of His Holy Spirit we may be disposed and enabled to yield a more suitable obedience to His righteous requisitions in time to come. . . .

1 J. Richardson, *supra* at 275. John Adams issued at least two additional Thanksgiving proclamations and James

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[4] State authorities were equally agreeable to proclaiming days of prayer, fast, and thanksgiving. John Jay (the first Chief Justice of this Court) as Governor of New York deemed it proper and constitutional to appoint a day of thanksgiving, requesting the people to show "national gratitude and obedience to the Supreme Ruler of all nations" on November 26, 1795. W. Jay, 1 *Life of John Jay* 385-386 (New York 1833). Governor Richard Howell of New Jersey proclaimed the same day one of thanksgiving and recommended its observance to the citizenry. "As Reasonable creatures, we are bound to acknowledge our Dependence upon God . . . [and] entertain a reasonable hope that God in His Providence will continue His many Favors." New Jersey State Gazette (Nov. 24 1795).

Madison issued at least four. *See* 1 J. Richardson, *supra* at 284-286, 513, 532-533, 558, 560-561.

Although the tradition of issuing such proclamations subsided for a period,[5] President Abraham Lincoln revived the Thanksgiving holiday stating,

> Now, therefore, in compliance with the request, and fully concurring in the views of the Senate, I do by this proclamation designate and set apart Thursday, the 30th day of April 1863, as a day of national humiliation, fasting, and prayer. And I do hereby request all people to abstain on that day from their ordinary secular pursuits, and to unite at their several places of public worship and their respective homes in keeping that day holy to the Lord and devoted to the humble discharge of the religious duties proper to that solemn occasion.

6 J. Richardson, *supra* at 164-165 (1897).

This Court's "Establishment Clause precedents have recognized the special relevance in this area of Justice Holmes' comment that 'a page of history is worth a volume of logic.'" *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 777 n.33 (1973), quoting

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[5] Thomas Jefferson thought such proclamations would violate the Constitution and did not issue any. *See*, A. Stokes & L. Pfeffer, *supra*, at 88. Nonetheless, President Jefferson later encouraged the establishment of denominational schools of religion on or adjacent to the public University of Virginia campus which would "offer the . . . advantage of enabling the students of the University to attend religious exercises . . . ." 19 Writings of Thomas Jefferson 415 (Mem. ed. 1904). Jefferson also wrote: "And can the liberties of a Nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God?" W. Berns, The First Amendment and the Future of American Democracy 13-14 (1976); *Illinois ex. rel. McCollum* v. *Board of Education*, 33 U.S 203, 246-247 (1948) (Reed, J., dissenting).

New York Trust Co. v. *Eisner*, 256 U.S. 345, 349 (1921). The Court has steadfastly "declined to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective as illuminated by history." *Walz* v. *Tax Commission*, 397 U.S. 664, 671 (1970). The historical objective since the inception of this country has been not only an accommodation of religious expression, but its active symbolic use by even the highest office in the land.

3. The Intent Of The First Amendment Was To Encourage Freedom For Religious Expression, And Not Censor Public Recognition Of Our Religious Heritage.

Far from silencing religious influences in society, the Framers saw no contradiction in "no law respecting an establishment of religion" and governmental encouragement of religion. The Framers did not intend to expunge religious influence from society or even foster a climate of detached neutrality towards religion.

In the opening speech of the debate in the First Congress which considered the proposed religion clauses, Peter Sylvester of New York expressed the fear that the Establishment Clause "might be thought to have a tendency to abolish religion altogether." 1 J. Gales, *The Debates and Proceedings in the Congress of the United States*, 729 (1834). More than one author has asserted that the chief sponsor of the First Amendment, James Madison, sought to allay the fears of Sylvester and other representatives by assuring them that among the most important purposes of the First Amendment was the advancement of the interests of religion. *The Garden and the Wilderness* 4 (M. Howe ed. 1965); M. Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* 6-11 (1978).

The purpose of the religion clauses was not freedom from religious symbols and other expression, but freedom *for* religious symbols and expression. Kirven, *Freedom of Religion or Freedom from Religion?*, 48 American Bar Association Journal 816 (1962). As James Madison himself observed, "There is not a shadow of right in the general [federal] government to intermeddle with religion. . . . This subject is, for the honor of America, perfectly free and unshackled. The government has no jurisdiction over it." 5 *The Writings of James Madison* 176 (G. Hunt ed. 1904).

In summary, Judge Thomas Cooley noted in this regard,

> It was never intended that by the Constitution the government should be prohibited from recognizing religion, or that religious worship should never be provided for in cases where a proper recognition of Divine Providence in the working of government might seem to require it, and where it might be done without drawing any invidious distinctions between different religious beliefs, organizations, or sects. The Christian religion has always been recognized in the administration of the common law; and so far as that law continues to be the law of the land, the fundamental principles of that religion must continue to be recognized in the same cases and to the same extent as formerly.

T. Cooley, *The General Principles of Constitutional Law in the United States of America* 205-206 (1880).

4. The State Constitutions At The Time Of The Framing Of The First Amendment Encouraged Religious Expression.

The desire to foster religious expression in public areas by the Framers of the Constitution can also be seen in the

context of each of the constituent states to the union. An inspection of the religion clauses in the state constitutions which were in effect during the period from 1789 to 1825 discloses that the people of not a single state desired an "absolute wall of separation." C. Antieau, A. Downey & E. Roberts, *Freedom from Federal Establishment* 161 (1964).[6] Instead, each state's constitutions publicly acknowledged the deity, often along with other symbolic references to our religious heritage.

The first senators and representatives doubtless were familiar with their respective state constitutions at the time of the framing of the First Amendment. There was no greater symbolic representation of a state's basis of government than its constitution. In every state constitution in force between 1776 and 1789 where "establishment" was mentioned it was equated to or used in conjunction with "preference." *See, e.g.*, F. Thorpe, 5 *The Federal and State Constitutions* 2597, 2635-2636, 2793, 3100 (1909).[7] As the Delaware Constitution of 1776 stated,

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[6] This book, which is cited extensively in this Brief and is the source of much of the information contained herein, was cited with approval by this Court in *Walz* v. *Tax Commission*, 397 U.S. 664, 675 n. 3 (1970).

[7] This Court in *Holy Trinity Church* v. *United States*, 143 U.S. 457, 468 (1892), stated,

> If we examine the constitutions of the various states we find in them a constant recognition of religious obligations. Every constitution of every one of the forty-four States contains language which either directly or by clear implication recognizes profound reverence for religion and an assumption that its influence in all human affairs is essential to the well being of the community. This recognition may be in the preamble, such as found in the Constitution of Illinois, 1870: "We the people of the State of Illinois, grateful to Almighty God for the civil, political and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations," etc.

"there shall be no establishment of any one religious sect in this State in preference to another." C. Antieau et al., *supra* at 133. The basic concern was not religious expression by any single group in a pluralistic society, but that the state might only allow a single religious group to express itself in preference to others.

Some of the state constitutions during 1789-1825 also specifically incorporated the desires of the citizenry that religious expression be financially aided by the state, which is not only symbolic but fiscal recognition as well. For example, the Massachusetts Constitution of 1780, which prevailed until 1833, provided:

> As the happiness of a people, and the good order and preservation of civil government essentially depend upon piety, religion and morality . . . the legislature shall from time to time authorize and require the several towns and parishes . . . to make suitable provision, at their own expense for the institution of the public worship of God.

The Maryland Declaration of Rights of 1776 empowered the Legislature to "lay a general and equal tax, for the support of the Christian religion." 3 F. Thorpe, *supra* at 1688. The people of Georgia in their 1789 Constitution provided: "No one religious society shall ever be established in this State, in preference to another. . . ." *Id.* at 801. They did not find it inconsistent to add financial support for religious symbols in a subsequent section,

> The arts and sciences shall be promoted, in one or more seminaries of learning; and the legislature shall, as soon as conveniently may be, give such further donations and privileges to those already established as may be necessary to secure the objects of their institution.

Id. at 801.

This Court has often indicated that contemporary state constitutions are relevant in construing the Untied States Constitution. It is important to note that under most of the state constitutions it was legally proper for the state to aid religion and religious education symbolically and even financially in the period immediately following ratification of the Bill of Rights.

5. The Grant Of Funds, Stipends, And Public Lands To Religious Organizations Indicates An Encouragement Of Public Religious Symbols And Expression Rather Than A Suppression Of Them.

As the states, the federal government itself was willing to recognize symbolically and even to aid financially religion and religious education in many ways. No hostility to either religious institutions or any of the symbolic expressions of their faith was ever displayed.

Congress, in the early years of our national existence, frequently made grants of land to educational institutions, both public and private. D. Hill & W. Fisher, *Federal Relation to Education* 23-24 (1931); E. Reisner, *Nationalism and Education Since 1789* 342-343 (1922). The Seventh Congress set aside a township of land in 1803 in the Ohio Territory "for the purpose of establishing an academy," and there was no limitation upon the sponsorship of such academy. 2 Stat. 226 (1803). The grant of land for schools without restriction that the school be nonsectarian was followed by the Eighth Congress in 1804 for the Indiana Territory, *id.* at 279. Similar unrestricted grants for religious and other schools were made by the Eleventh Congress in 1811 for the Louisiana Territory, *id.* at 621, and by the Fifteenth Congress in 1818 for the Territory of Michigan. 3 Stat. 430 (1818). In the Alabama Territory a township was reserved in 1818 by the same Congress "for the support of a seminary of learning," *id.*

at 467, and a township was set aside by the Nineteenth Congress for the same purpose in the Florida Territory. 4 Stat. 201 (1827).

The understanding that the First Amendment did not prevent federal governmental grants to church-related educational institutions is vividly shown by unrestricted grants of land "to the amount of twenty-five thousand dollars" each to two denominational institutions in the District of Columbia: Columbian College (religious) in 1832 and Georgetown College (Roman Catholic) the following year. 4 Stat. 603-604 (1832); 6 Stat. 538 (1833). Furthermore, Congress was willing during the first year of national life to reserve and appropriate land for the encouragement of religion, and there is no reason to believe that the members of Congress deemed such aid inappropriate.[8] In 1787 the Congress had granted land to the Ohio Company, reserving various plots "for the encouragement of religion." 1 Stat. 257 (1787). While it is true that President Madison vetoed an 1811 bill providing for a grant of land to a Baptist church in Salem, Mississippi, Congress obviously had concluded to the contrary that the bill was constitutional. 8 *Writings of James Madison* 133 (Hunt ed. 1904).

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[8] This is distinctly shown by the large number of states which accepted as proper the grant of public lands to religious institutions. For example, a number of religiously owned academies in Massachusetts were given such assistance in the period from 1780 to 1800. S. Smith, The Relation of the State to Religious Education in Massachusetts 114 (1926). In 1790 the New York Legislature gave Columbia College and a number of academies public lands. C. Mahoney, The Relation of the State to Religious Education in Early New York, 1633-1825, 92 (1941). In the southern states the people were equally in agreement that granting state lands to religious organizations was desirable. *See, e.g.*, 5 South Carolina Statutes 357 (1799).

Congress following the ratification of the First Amendment not only granted public lands, but used public funds to further exposure to religion. In 1803, for example, President Thomas Jefferson requested and received ratification from the Senate for a treaty with the Kaskaskia Indians. This treaty provided:

> And whereas the greater part of said tribe have been baptized and received into the Catholic Church, to which they are much attached, the United States will give annually, for seven years, one hundred dollars towards the *support of a priest of that religion*, who will engage to perform for such tribe the duties of his office, and also to instruct as many of their children as possible, in the rudiments of literature, and the United States will further give the sum of three hundred dollars, *to assist said tribe in the erection of a church.*

W. Sweet, *Religion in the Development of American Culture 1765-1840* 242 (1952). The Jefferson administration made similar appropriations in at least two other treaties with Native American tribes. "Treaty with the Wyandots, etc.," 7 Stat. 88 (1805); "Treaty with the Cherokees," *id.* at 102.

Again, in March of 1819, the Congress indicated that it considered that it was proper and constitutional to appropriate $10,000 to be given to the mission boards of many denominations for work among various tribes. R. Beaver, *Church, State and the Indians*, 4 Journal of Church and State 23-24 (1962). John C. Calhoun, as Secretary of War from 1817 to 1825, gave mission societies thousands of dollars to Christianize and educate Native Americans. Edwards, *A Problem of Church and State in the 1870's* 11 Mississippi Valley Historical Review 39 (1924). The use of Land Statutes and federal funds to proselytize the Native

American population continued until the turn of the last century. As one author has observed:

> by 1896, Congress was appropriating annually over $500,000 in support of sectarian Indian education carried on by religious organizations. This expenditure of public money appropriated by Act of Congress for over a century following the ratification of the First Amendment constitutes absolute proof that for over a century neither Congress nor the religious leaders interpreted the First Amendment to mean a prohibition of the use of public funds by Congress in aid of religion and religious education.

J. O'Neill, *Religion and Education Under the Constitution* 30-33 (1949). By subsidizing various missionary works among the Native American tribes, Congress not only took symbolic acts recognizing the religious element in society, but gave its symbolic imprimatur to religious expression. It therefore cannot now be said that much lesser symbolic religious representations by private parties in public forums represent a violation of the First Amendment.

C. The Symbolic Focal Point Of The Country, This Nation's Capitol, Has A Myriad Of Religious References Throughout Its Historic Sights.

The word "symbolism" by its very definition is the "practice of representing things by means of symbols or of attributing symbolic meanings to objects, events, or relationships." *The American Heritage Dictionary* 1231 (2d ed. 1985). The Argument put forth by the Respondents in this case is that the Christmas tree, the creche, and the menorah are symbolic of underlying religious themes or messages and therefore this public display violates the Establishment Clause.

If these objects are violative, then so are many of the symbolic edifices standing in the nation's Capitol which honor the great achievements and leaders of this country. Millions of people from across the country and around the world have viewed these distinguished buildings and monuments and have been moved by them. Those memorials inscribed with religious scriptures or religious observations hold more religious importance and are more likely to proselytize the viewers than the three symbols currently under dispute before the Court.

The Jefferson Monument not only honors the figure of President Thomas Jefferson, but it extols his writings as well. One wall of the Jefferson Monument enshrines the first portion of the Declaration of Independence, proclaiming it "self evident that all men are created equal, that they are endowed by their Creator with certain unalienable Rights . . . ." On another wall of the same monument is a quote from the Virginia Statute for Religious Freedom, stating in part that "Almighty God hath created the mind free, and manifested his supreme will that free it shall remain of all attempts to influence it by temporal punishments or burthens . . . are a departure from the Holy Author of our religion . . . ." *See*, M. Murdock, *Your Memorials in Washington* at 142-145 (1952).

Perhaps the greatest symbol of our democracy at work is the Capitol building. In the Capitol Building a room was specially set aside by the 83rd Congress in 1954 for prayer for members of the Senate and House of Representatives. In the center of the room is a stained glass panel of President George Washington kneeling in prayer with the first verse of Psalm 16 etched in the glass below him as follows.

> Preserve me, O God; for in
> thee do I put my trust.

The Statuary Hall in the Capitol building, originally the House of Representatives' chamber, contains statutes of ministers and Christians of historical importance from almost every state of the Union. In addition to this, an inscription in golden letters is engraved over the Speaker's rostrum in the House of Representatives stating this Country's national motto, "In God We Trust."

Another important institution, the Library of Congress, features other symbolic expressions of our religious heritage. Of all the important pieces of literature which could be exhibited from the archives of the world's largest library, it is one of the remaining Guttenburg Bibles which sits in prominent display. In the main reading room of the library symbolic figures adorn the uppermost portions of the walls. Over the figure of religion is a quote from the Bible, "[w]hat doth the Lord require of thee but to do justly to love mercy and to walk humbly with thy God." (Micah 6:8) Above the figure of science is the phrase, "The Heavens Declare the glory of God and the firmament show his handiwork." (Psalm 19:1) H. Small, *The Library of Congress: Its Architecture and Decoration* 92 (1982).

The Lincoln Memorial has inscribed on one of its walls the Gettysburg Address, which contains the words "This Nation Under God." Murdock *supra* at 109. The Washington Monument, dominating the landscape of the Nation's Capitol and venerating the Father of our Country, is constructed of Memorial Blocks contributed by individuals, churches, and associations throughout the United States extolling the virtues of God and His blessings upon the Nation. Inscribed in Latin on the very tip of the Monument are the words "Praise be to God." *See generally,* R. Zapp, *The Washington Monument* (1900).

Last but not least is this Supreme Court, whose opening invocation asks God to bless its affairs. *Guide to the United States Supreme Court* 27 (1979). Attorneys admitted to the Supreme Court bar take the oath of admission with their hands figuratively placed on the Bible held out by the Clerk. The oath contains the phrase, "so help me God." Directly above where the Justices sit in session, carved in relief in the very stone of the building is a representation of Moses in the form of the "majesty of the law" and the Ten Commandments. *Guide to the United States Supreme Court* 4 (1979).

These national symbols have an inherent religious theme, but they have an historical one as well. The constitutionality of such displays can only be determined in the context of their historical tradition or their commemorative nature.

For example, since the context is the basis of a symbol's meaning, in the present case it would be as arbitrary to isolate the creche from the entire city celebration as to isolate the individual items in the creche from each other. Alone, the manger or a figurine of a sheep or king has no religious significance. Each item's meaning is gained through an integration with the other components of the display; their meaning is in their context. The same is true of trying to discover the meaning of Allegheny County's Christmas display of which the creche is a part, or of the City's entire seasonal celebration, of which the display is a part.

Attempting to extract secular meanings from memorials or displays which have religious connotations in order to justify their constitutionality is an unnecessary exercise in legal circumlocution. The tradition, historical context, and commemorative nature of the displays are all

that need be examined in order to justify their constitutionality. Just as our national motto is part of the historical make-up of our society, the display during the winter holidays of the menorah, creche, and Christmas tree is inextricably rooted into our national heritage. Not only do the displays symbolize a time of celebration, but they symbolize the basis of those holidays as well. To declare these displays unconstitutional because of an underlying religious theme compels the conclusion that each of the aforementioned national monuments is also in contempt of the Constitution.

CONCLUSION

Absolute prohibition of any religious expression which may be linked even incidentally to the public domain is the ultimate goal of the Respondents in this case. Such an object flies in the face of constitutional intent, history, and this Court's clear precedent.

Obdurate application of the Establishment Clause to any expression or symbol which may have a religious connotation to it would invariably lead to censorship of every aspect of our religious heritage. Justice Douglas foresaw this possibility in *Zorach* v. *Clauson*, when he stated,

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for a wide variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it

> follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. . . .

343 U.S. 313-314. The Establishment Clause has never required government to exclude religion in an unyielding manner from our public occasions and institutions.[9] Allowing such symbolic acts as the Postmaster General placing the image of the Madonna on a commemorative stamp at Christmas time,[10] and permitting the singing of Christmas carols or the portrayal of the First Christmas in school programs,[11] shows that traditional acknowledgements of the religious elements of our heritage fit comfortably within the zone of permissible governmental interaction with religion.

This Court has always recognized the constitutionality of acknowledging our religious heritage. Religious sym-

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[9] This can be seen in the manner which this Court has acknowledged the right to community groups to display such religious symbols. *See, e.g., Anderson* v. *Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1973), *cert. denied*, 414 U.S. 879 (1973) (the maintenance of an illuminated granite monolith on which the Ten Commandments were inscribed together with other symbols involved a primarily secular rather than religious purpose); *Paul* v. *Dade County*, 202 So.2d 833 (Fla. Ct. App.), *cert. denied* (1968), (a fifty foot cross located on public fair grounds was held not violative of a state constitutional provision prohibiting aid to religious institutions).

[10] *Protestants and Other Americans United for Separation of Church and State* v. *O'brien*, 272 F. Supp. 712 (D.D.C. 1967).

[11] *Florey* v. *Sioux Falls School District*, 619 F.2d 1311 (8th Cir. 1980).

bols and their inter-relationship with the government are not an historical anomaly, and remain in present-day America as historical evidence of constitutional intent. Whether the observer wishes to construe these actions as symbolic vestiges of a religious past or as a symbol of a thriving religious present, the fact is that they remain. Other examples of this current religious symbolism are oaths of allegiance for government and court officers;[12] a national anthem containing a statement of religious belief (in the last verse of the "Star Spangled Banner" is the phrase, "And this be our motto 'In God is our Trust.'"); a national motto ("In God We Trust") displayed on all United States coins and currency;[13] a Pledge of Allegiance that recognizes religious heritage;[14] a national day of prayer;[15] and customary court oaths and judicial protocol. The fact that these symbols and symbolic acts continue to be so widespread throughout our government illustrates the historic affinity between constitutional principles and symbolic expression.

To find that the display of the menorah, creche, or Christmas tree violates the First Amendment is to find these more explicit expressions listed above (and others discussed earlier) to be constitutionally infirm. The Framers never intended to eradicate public display of religious symbols. Nor did they envision that one day their carefully constructed Constitution would be used as a sweeping scythe, indiscriminately cutting away the display of the articles of their faith in the name of liberty.

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[12] U.S. Constitution Article VI; *Engle* v. *Vitale*, 370 U.S. 421, 466 n.3 (1962).

[13] 31 U.S.C. § 324 (1976).

[14] 36 U.S.C. § 172 (1982).

[15] 36 U.S.C. § 169h (1982).

The decision of the Court of Appeals flagrantly conflicts with this Court's clear precedent, with the intentions of the Framers of the First Amendment and with the history of the Republic. Therefore, it is vital that this dispute be resolved in favor of the petitioners.

Date: November 17, 1988

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania, the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania, and CHABAD,

Petitioners,

vs.

AMERICAN CIVIL LIBERTIES UNION GREATER PITTSBURGH CHAPTER, ELLEN COYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HOWARD ELBLING, HILARY SPATZ LEVINE, MAX LEVINE and MALIK TUNADOR,

Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE NATIONAL LEGAL FOUNDATION AMICUS CURIAE, IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

The National Legal Foundation is constituted for the purpose of advocacy in support of a proper rendering of the First Amendment. While typically this involves the Foundation on the side of individual plaintiffs, in this instance, it argues in support of legitimate and historically acceptable governmental acknowledgment of the religious heritage of this country embodied in the legal holiday of Christmas and against censorship of Americas's religious heritage. The Court's decision in this case will dramatically affect the ability of our nation's elected officials at all levels of government to recognize the religious heritage of America upon special occasions in keeping with the best traditions of our nation. Otherwise, a pall of secularism that denies history will descend upon all of American public life.

The National Legal Foundation is a non-profit corporation organized to defend, restore and preserve constitutional liberties, family rights and other inalienable freedoms.

Counsel of record for Amicus Curiae, Robert K. Skolrood is Executive Director and Douglas W. Davis is Senior Staff Attorney for The National Legal Foundation. Counsel for Amicus Curiae specialize in constitutional litigation and have participated in significant cases relating tc First Amendment and other constitutional freedoms.

The National Legal Foundation believes the experience of its attorneys will be of assistance to the court in evaluating this

case. Counsel of Record for all parties in this case have consented to the filing of this brief and letters of consent have been filed with the Clerk pursuant to Rule 36.

ISSUE PRESENTED

Does the inclusion of a creche and menorah in a public display commemorating the Christmas holiday violate the Establishment Clause of the First Amendment?

SUMMARY OF ARGUMENT

This Court has often looked to history to review the actions of the Framer's of the First Amendment and thereby determine how they thought that Amendment should be applied. The historical record reveals that the Framer's saw no conflict between the prohibitions of the First Amendment particularly the Establishment Clause, and government acknowledgment of the religious heritage of the American people and nation in the context of special occasions. For this reason, the Framers sanctioned opening prayers at sessions of Congress, acknowledged God in Presidential inauguration speeches, and proclaimed days of Thanksgiving in recognition of God's blessings upon the nation. Each of these practices continues to the present day having withstood challenges in this Court. In addition to these practices, government acknowledges our religious heritage upon its coins, in our Pledge of Allegiance, upon our government buildings, and by proclamations in the executive branch.

Observation of the Christmas holiday by public display of a creche or menorah is no different than other practices recognizing America's religious heritage. The display is not a proselytizing activity, but rather a permissible acknowledgment of the religious nature of a legally recognized American holiday. Any attempt to sanitize the observance of Christmas of all religious aspects would be contrary to the intent of the Establishment Clause as revealed in the actions of its Framers.

Display of the creche and menorah in commemoration of the Christmas holiday is also permissible under the tri-partite test announced in Lemon v. Kurtzman, 403 U.S. 602 (1971). The creche and menorah, as part of the County and City's Christmas display, serve the secular purpose of recognizing a legal holiday. The creche and menorah in the display are traditional symbols of the American historical and cultural celebration of the holiday. The dominant message, and therefore the primary effect of the display, is to acknowledge the holiday in all its many dimensions, not to advance religion. The presence of a certain number of non-religious decorations in the vicinity of the creche and menorah are of no constitutional significance. It is the display within the context of acknowledging the holiday which determines its primary effect. Finally, no excessive entanglement exists between religion and the government.

The decision of the Court of Appeals conflicts with the intentions of the Framers of the First Amendment and with present Constitutional analysis. This Brief of The National Legal Foundation Amicus Curiae, in support of petitioners urges reversal of the decision of the Third Circuit Court of Appeals.

THE COUNTY OF ALLEGHENY

Petitioners

v.

AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER

Respondents

ARGUMENT

I.

Inclusion Of A Creche Or Menorah In A Public Display Observing The Christmas Holiday Does Not Violate The Intentions Of The Framers Of The First Amendment As Revealed By History.

In evaluating any case under the Religion Clauses of the First Amendment the Court has always sought to apply the clauses so as not to "undermine the ultimate constitutional objective as illuminated by history." Walz v. Tax Commission, 397 U.S. 664, 671 (1970). As the Court has noted with regard to interpreting the Constitution, "Any deviation from their [the Framer's] intentions frustrates the permanence of

that Charter and will only lead to ... unprincipled decisionmaking ...." Wallace v. Jaffree, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting).

Recurrence to these fundamental principles is particularly important in the present case. Reflection upon the historical events surrounding the adoption of the First Amendment shows that acknowledgment and observance of America's religious culture and heritage upon special occasions by government is not the type of activity which the Framer's intended the Establishment Clause to forbid.

A. The Framers of the First Amendment sponsored and participated in observances recognizing the religious heritage of America.

The public actions of the Framers of the First Amendment contemporaneous with the debate and adoption of that Amendment establish that acknowledgment and

observance of America's religious culture and heritage by government is not the type of activity that the First Amendment was intended to prevent. As the Court has noted, the Congress which drafted the First Amendment "was a Congress whose constitutional decisions have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of that fundamental instrument" Myers v. United States, 272 U.S. 52, 174-5 (1926), cited in Lynch v. Donnelly, 465 U.S. 668, 674 (1984).

In Marsh v. Chambers, 463 U.S. 783 (1983), the Court noted that just three days after the First Congress authorized appointment of paid chaplains to open sessions of Congress with prayer, the same Congress reached final agreement on the language of the First Amendment. Marsh, 463 U.S. at 788. The Framer's of the First Amendment saw no conflict between

the proscriptions of that Amendment and the daily observance of prayer at the very seat of government.

This understanding was not limited to the legislative branch. George Washington, upon the occasion of his inauguration, took opportunity to acknowledge America's religious heritage. Standing on the second-floor balcony of Federal Hall, then the seat of the United States government, he stated:

> It would be peculiarly improper to omit in this first official act my fervent supplications to that Almighty Being who rules over the universe, who presides in the councils of nations, and whose providential aids can supply every human defect, that His benediction may consecrate to the liberties and happiness of the people of the United States a Government .... In tendering this homage to the Great Author of every public and private good, I assure myself that it expresses your sentiments not less than my own .... No people can be bound to acknowledge and adore the Invisible Hand which conducts the affairs of men more than those of the United States. Every step by which they have advanced to the

> character of an independent nation seems to have been distinguished by some token of providential agency.

G. Washington, First Inaugual Address, in 1 Messages and Papers of the Presidents 44 (J. Richardson ed. 1897).

It was the First Congress which urged President Washington,

> to recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God, especially by affording them an opportunity peaceably to establish a form of government for their safety and happiness;

G. Washington: A National Thanksgiving, Messages and Papers, 1:56.

As the Court has noted, this resolution was passed on the same day that final agreement was reached on the language of the Bill of Rights, including the First Amendment. Marsh, 463 U.S. at 788 n.9; Lynch, 465 U.S. at 675 n.2. President Washington set aside November 26, 1789:

> to be devoted by the people of

> these States to the service of that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be; that we may then all unite in rendering unto Him our sincere and humble thanks for His kind care and protection of the people of this country previous to their becoming a nation; for the signal and manifold mercies and the favorable interpositions of His providence in the course and conclusion of the late war ... for the peaceable and rational manner in which we have been enabled to establish constitutions of government for our safety and happiness, and particularly the national one now lately instituted; for the civil and religious liberty with which we are blessed ...
>
> And also that we may then unite in most humbly offering our prayers and supplications to the great Lord and Ruler of Nations, and beseech Him to pardon our national and other transgressions; to enable us all, whether in public or private stations, to perform our several and relative duties properly and punctually; to render our National Government a blessing to all the people by constantly being a Government of wise, just, and constitutional laws, discreetly and faithfully executed and obeyed ....

Messages and Papers 1:56.

This tradition, carried out by our presidents and fixed by the official

Thanksgiving holiday, is the clearest example of permissible acknowledgment by the government of the religious aspect of American life and culture. As President Reagan noted in a recent Thanksgiving proclamation:

> As we remember the faith and values that made America great, we should recall that our tradition of Thanksgiving is older than our Nation itself. Indeed, the native American Thanksgivings antedated those of the new Americans. In the words of the eloquent Seneca tradition of the Iroquois, " ... give it your thought, that with one mind we may now give thanks to Him our Creator."
>
> From the first Pilgrim observance in 1621, to the nine years before and during the American Revolution when the Constitutional Congress declared days of Fast and Prayer and days of Thanksgiving, we have turned to Almighty God to express our gratitude for the bounty and good fortune we enjoy as individuals and as a nation. America truly has been blessed.

R. Reagan, 1984 (Book 2) Pub. Papers 1576 (Proclamation 5269, October 19, 1984).

Acknowledgment of America's religious heritage is by no means limited to

Congressional prayer, inaugural addresses, and Thanksgiving proclamations. The national motto, "In God We Trust;" the Pledge of Allegiance; the Capitol prayer chapel; the depiction of Moses and the Ten Commandments in the Court's chambers; Proclamation of a National Day of Prayer; and Proclamation of Jewish Heritage Week are just a few of "countless other illustrations of the Government's acknowledgment of our religious heritage and governmental sponsorship of graphic manifestations of that heritage." Lynch, 465 U.S. at 676-77 (emphasis added).

In Marsh, the Court stated that "[H]istorical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress - their actions reveal their intent." Marsh, 463 U.S. at 790. As the

evidence above clearly shows, the Framers of the First Amendment never intended the Establishment Clause to forbid the acknowledgment of our religious heritage. Any present interpretation of that Clause by the Court that "sweeps away the practices of the Framers themselves, ... is implausible as well as inappropriate. We should not treat them [the Framers] as hypocrites about their own handiwork." American Jewish Congress v. City of Chicago, 827 F.2d. 120, 140 (7th Cir. 1987) (Easterbrook, J., dissenting).

B. Display of a creche or menorah by the County or City during the Christmas season is a historically permissible acknowledgment of the religious heritage of that national holiday.

The display of the creche and menorah on public property during the Christmas holiday is indistinguishable from acknowledgments of our religious heritage

practiced at the time the First Amendment was adopted. Christmas has been observed and celebrated since the first settlment of the country. The use of crech scenes as part of the American celebration of Christmas date to the Moravian settlements in Pennsylvania beginning in 1741. E. Tennant, American Christmases: From the Puritans to the Victorians 66-71 (1975). After the Revolutionary War, towns such as Bethlehem, Pennsylvania and Salem (now Winston-Salem), North Carolina, founded by the Moravians, made erection of a creche scene, then called a Putz, a community project. American Christmases, at 71. As distinctly Moravian communities were absorbed into general American culture, the creche became a part of our Christmas celebration.

> By the mid-nineteenth century, the young Republic had matured into the American nation: geographically spread from "sea to shining sea," culturally distinctive, and

> spiritually content with religious diversity. Likewise, the celebration of Christmas coalesced; bits and fragments of ancient customs from many homelands blended with distinctly American innovations to become the "old-fashioned Christmas."

American Christmases at 99.

Like the practice of observing a day of Thanksgiving to God, or opening legislative sessions with paid chaplains, the observation of the Christmas holiday dates to the very founding of the country, with the specific display of creche scenes existing for over 200 years. Both Thanksgiving and Christmas their religious character not withstanding, are legal public holidays on which federal government employees are paid regular wages. 5 U.S.C.S. §§6103, 6104. As noted above, there has never been any attempt to sanitize the Thanksgiving holiday of its religious character. Presidents from Washington to Reagan have openly expressed

that gratitude must be directed to God. That practice in America is traced to a group of religious people - the Pilgrims - who came to this country "for the Glory of God, and Advancement of the Christian Faith." Mayflower Compact in R. Perry, Sources of Our Liberties 60 (1978).

Similarly, there is no reason why the display of a creche or menorah within the County's and City's exhibits "would so 'taint' the ... exhibit as to render it violative of the Establishment Clause." Lynch, 465 U.S. at 686. In Lynch the Court specifically stated that forbidding use of a creche in a government- sponsored exhibit acknowledging the holiday "at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, and while the Congress and legislatures open sessions with prayers by paid chaplains would be a stilted overreaction

contrary to our history and to our holdings. Lynch, 465 U.S. at 686.

II

Inclusion Of A Creche Or Menorah In A Public Display Observing The Christmas Holiday Is Mandated Under Current First Amendment Analysis As Well As Historical Analysis.

While the Court has "repeatedly emphasized our unwillingness to be confined to any single test or criterion" in evalutating claims under the First Amendment, Lynch, 465 U.S. at 679, the Court has consistently relied upon the three-part test enunciated in Lemon v. Kurtzman, 403 U.S. 602 (1971). To pass scrutiny, the challenged conduct must have a secular purpose, must not have the primary effect of advancing or inhibiting religion, and it must not create excessive entanglement of government with religion.

A. Inclusion of a creche or menorah in a public display observing the Christmas holiday serves a secular legislative purpose.

The Appellate Court made no statement with regard to the first prong of the Lemon test, resting its decision solely on the second, "primary purpose," prong. American Civil Liberties Union v. County of Allegheny, 842 F.2d. 655, 663 (3rd Cir. 1988). The Court in Lynch, however, decisively answered that question:

> The display is sponsored by the city to celebrate the Holiday and to depict the origins of that Holiday. These are legitimate secular purposes.

Lynch, 465 U.S. at 681.

This statement comports with the historical observance by government of our national heritage. There is absolutely no evidence in the record that "inclusion of the creche is a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message." Lynch, 465 U.S. at 680. Neither does the display

promote one religion over another. It is merely a recognition of religion as an integral part of American culture.

B. Inclusion of a creche or menorah in a public display observing the Christmas holiday does not have the primary effect of advancing or inhibiting religion.

The Court of Appeals rested its opinion solely upon a supposed violation of the second, primary effect, test of the Lemon 3-part analysis. County of Allegheny, 842 F.2d. at 661-62. In doing so, the court ignored the controlling language of this Court's opinion in Lynch. There the Court stated:

> What was said about the legislative prayers in Marsh ... and implied about the Sunday Closing Laws in McGowan is true of the city's inclusion of the creche: its 'reason or effect merely happens to coincide or harmonize with the tenets of some ... religions.'
>
> The Court has made it abundantly clear, however that "not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit

> upon [religion] is, for that reason alone, constitutionally invalid." Nyquist, 413 U.S. at 771 .... Here, whatever benefit to one faith or religion or to all religions is indirect, remote, and incidental; display of the creche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as 'Christ's Mass,' or the exhibition of literally hundreds of religious paintings in governmentally supported museums.

Lynch, 465 U.S. at 682, 683.

To avoid this clear and compelling holding, the Appellate Court formulated a six variable test for assessing the primary effect of display of the creche and menorah at the County and City Buildings.* County of Allegheny,

---

* The six variables are:
(1) the location of the display; (2) whether the display is part of a larger configuration including nonreligious items; (3) the religious intensity of the display; (4) whether the display is shown in connection with a general secular holiday; (5) the degree of public participation in the ownership and maintenance of the display; and (6) the existence of disclaimers of public sponsorship of the display.

842 F.2d. at 662. Included in these six variables were supposedly significant distinctions from Lynch utilized in two other cases. American Civil Liberties Union v. City of Birmingham, 791 F.2d. 1561 (6th Cir. 1986), cert den. 107 SCt. 421 (1986) (creche not subsumed in other Christmas decorations); American Jewish Congress v. City of Chicago, 827 F.2d. 120 (7th Cir. 1987) (creche located at city hall rather than park).

The powerful dissenting opinion of Judge Weis in the Court of Appeals absolutely refutes the attempted departure from Lynch. Addressing the placement issue, Judge Weis noted that the Lynch Court specifically stated that the Pawtucket creche "was essentially similar to other displays found nationwide - 'often on public grounds.' Lynch, 465 U.S. 671," County of Allegheny, 842 F.2d at 668. (Weis, J., dissenting). Judge

Weis also noted that the placement distinction was difficult to reconcile with the holding in Marsh, where the challenged prayers took place in the legislative hall itself and yet were not considered an action which had the primary effect of advancing religion.

It has also been argued that the creche and menorah were impermissibly displayed because they were not subsumed in more secular decorations which made the creche in Lynch an acceptable acknowledgment of the holiday. Instead it was "the creche in the context of the Christmas season," that altered "what viewers may fairly understand to be the purpose of the display - as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content." Lynch 465 U.S. at 679, 692, (O'Connor, J. concurring), cited in County

of Allegheny 842 F.2d at 669. (Weis, J., dissenting). This approach is no different in principal from the approach taken by the District Court in Lynch and specifically rejected by this Court. It focuses "almost exclusively on the creche" - How big is the creche? How close is it to other symbols? - and not on "the proper context of the Christmas Holiday season." Lynch, 465 at 680.

There is no violation of the "primary effect" prong of the Lemon test. There is no evidence suggesting that the placement of the creche and menorah in the public diplay "has been exploited to prozelytize or advance any one, or to disparage any other, faith or belief." Marsh, 463 U.S. at 794-95. Rather, "it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." Marsh, 463 U.S. at 792.

C. Inclusion of a creche or menorah in a public display observing the Christmas holiday does not create excessive entanglement with religion.

The Court of Appeals made no finding with regard to the 3rd prong of the Lemon test. County of Allegheny, 842 F.2d at 663. In Lynch, the Court specifically noted that Pawtucket did not consult church authorities about displaying the creche. It did expend nominal sums for erection and lighting of the display. This limited achievement was, however, not "the 'comprehensive, discriminating, and continuing state surveliance' or the 'enduring entanglement' present in Lemon, 403 U.S., at 619-622. Cited in Lynch, 465 U.S. at 684. The present case presents even less involvement than was recognized in Lynch. No money is expended for the creche. Although the menorah is erected by city employees, the expense is incidental under the Lynch analysis.

There is nothing that would place the present Christmas display outside the holding of this Court in Lynch.

III.

Conclusion

Whether analyzed according to the intent of the Framers of the First Amendment as revealed by their actions or under the 3-part Lemon test most frequently used by this Court, the inclusion of a creche or menorah in a public display during the Christmas holiday does not violate the Establishment Clause. The display is a permissible acknowledgment of the religious heritage embodied in America's celebration of the Christmas holiday. In this regard, the display is no different from "Prayers in our legislative halls; the appeals to the Almighty in the messages of our Chief Executive; the proclamations making

Thanksgiving Day a holiday; 'so help me God' in our courtroom oaths - these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies ...." which have never been held as "flouting the First Amendment." Zorach v. Clauson 343 U.S. 306, 312-13 (1952).

Nothing in the history of jurisprudence of this nation reveals an intent on the part of the Framers to censor or eradicate religion from public life or to deny the religious heritage of this nation. In fact, the opposite is true. Commenting in the ruling in Lynch, writer and philosopher, Richard John Neuhaus stated:

> The Pawtucket ruling .... says that our public life should reflect the vibrant pluralism that is America. That pluralism includes religion and religious symbols in public.
>
> A public square that is stripped of all signs of our differences may offend nobody, but it will also be a public square in which nobody feels

> at home. A naked public square or a homogenized pulic square is a profoundly undemocratic public square.

R. Neuhaus, Religion in Public Places, Wash. Times, May 2, 1986, at 3D.

The decision of the Court of Appeals runs counter to this fundamental truth by attempting to sanatize all public acknowledgment of our nations holidays and heritage of religion and religious symbols. For this reason, it is essential that this conflict be resolved in favor of the petitioners.

Respectfully submitted,

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The National Legal Foundation

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

NO. 87-2050

COUNTY OF ALLEGHENY

Petitioners

v.

AMERICAN CIVIL LIBERTIES UNION,
GREATER PITTSBURGH CHAPTER

Respondents

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I HEREBY CERTIFY that on this 17th day of November, 1988, three copies of the Brief of Amicus Curiae, and a copy of the Statement Concerning First Class Mailing, were sent by first class mail with postage prepaid to each of the following pursuant to S. Ct. Rule 28.5 (b):

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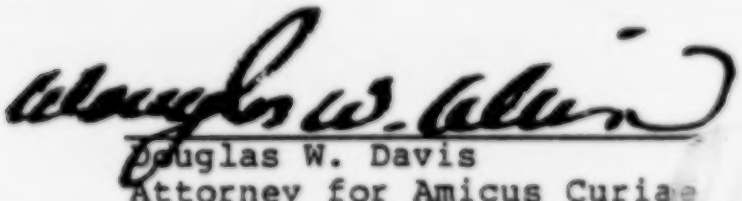

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Subscribed this 17th day of November 1988.

The National Legal Foundation

By: Douglas W. Davis
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Subscribed and Sworn before me this 17th day of November, 1988.

Jennifer G. Spell
Notary Public

My Commission Expires: September 1, 1992.

(11) (10) (10)

Nos. 87-2050, 88-90, 88-96

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania, the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania, and CHABAD,

Petitioners.

vs.

AMERICAN CIVIL LIBERTIES UNION GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HOWARD ELBLING, HILARY SPATZ LEVINE, MAX A. LEVINE and MALIK TUNADOR,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

---

BRIEF OF THE AMERICAN JEWISH COMMITTEE, THE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A., THE UNION OF AMERICAN HEBREW CONGREGATIONS, THE COUNCIL ON RELIGIOUS FREEDOM, AND AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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HOPP

QUESTIONS PRESENTED

1. Whether the display during the December holiday season of an unadorned creche at a prominent location inside the Allegheny County Courthouse, which houses the County's executive officers, its commissioner, controller, treasurer and sheriff, in addition to some of its criminal and civil courts, violates the Establishment Clause of the First Amendment of the United States Constitution.

2. Whether the display of an unadorned menorah at a prominent location on the outside steps of the City-County Building, which houses the offices and chambers of the Mayor and City Council, its treasurer, marriage license bureau, register of wills and county prothonotary (clerk), as well as the principal county courts, the Supreme and Superior Courts, violates the Establishment Clause of the First Amendment of the United States Constitution.

STATEMENT OF INTEREST

The American Jewish Committee ("AJC"), the National Council of the Churches of Christ in the U.S.A. (the "National Council of Churches"), the Union of American Hebrew Congregations ("UAHC"), the Council on Religious Freedom, and Americans United for Separation of Church and State, as amici curiae, respectfully submit this brief in support of respondents, requesting affirmance of the decision below.

The AJC, a national organization of approximately 50,000 members founded in 1906, is dedicated to the defense of the civil rights and religious liberties of American Jews. These rights and liberties, however, can only be secure for Jews when they are equally secure for Americans of all other faiths. AJC is committed to the belief that separation of religion and government is the surest guarantee of religious liberty for all and has proved of inestimable value to the free exercise of religion in a pluralistic society.

In the view of the AJC, government display of a creche or menorah or comparable religious symbols at the seat of government represents official endorsement or sponsorship of a relig-

ious message that other sects do not accept and reflects invidiously on those non-participating sects' religious beliefs and on their adherents' status in the political community. A creche, which depicts the birth of Jesus as the birth of a divinity, is unmistakably and unalterably religious, indeed doctrinal in nature. Similarly, a menorah is a religious symbol, ceremonially used to fulfill a religious obligation in observance of a Jewish holiday. The placement of a creche on the Grand Staircase of the Allegheny County Courthouse and of a menorah on the front steps of the Pittsburgh City-County Building, not as part of some more secular or commercial display, but for the purpose of promoting their religious themes, is tantamount to state acceptance of particular religious doctrines in violation of the Establishment Clause of the First Amendment of the United States Constitution.

The National Council of Churches is the cooperative agency of thirty-one national religious bodies in the United States having an aggregate membership of more than 40,000,000. The Council does not presume to speak for all of those adherents but for its Governing Board, the body of some 280 members appointed by the several member denominations in proportion to their size and their support of the Council.

In the view of the National Council of Churches, government acceptance of a creche on public property not only secularizes and degrades a sacred symbol of Christianity, but also represents either a presumptuous identification by government with that religion and its symbols or an equally presumptuous identification by Christians of their religious traditions with the institutions of government.

The UAHC is the central body of 840 Reform synagogues in the United States and Canada. Its membership combines more that 1,250,000 Jewish persons. Through its Commission on Social Action, it represents also the Central Conference of American Rabbis, which comprises the Reform rabbinate, as well as all affiliated bodies of Reform Judaism. From its inception in 1873, the UAHC has vigorously opposed all intrusions upon the constitutional principle of separation of church and state.

The Council on Religious Freedom is a nonprofit corporation which was formed to uphold and promote the principles of religious liberty. The objectives and purposes of the organization include taking action to eliminate the unnecessary entanglement of religion and state and other areas of concern which interfere with the full experience of religious freedom. Its Board of Directors is composed of individuals who are active in religious affairs, some in an official capacity and some on a lay basis, and who recognize the importance of preserving and promoting the constitutional principle of the free exercise of religion and opposing any official endorsement of particular religious doctrines in contravention of the Establishment Clause of the First Amendment.

Americans United for Separation of Church and State is a nonprofit corporation formed to maintain and advance civil and religious liberties through enforcement of the rights and privileges granted by the First and Fourteenth Amendments to the United States Constitution. This group has a membership of some 40,000 members of various religious beliefs and some of no religious belief in all states of the United States. It is involved in extensive litigation of First Amendment religious freedom issues throughout the nation, including such major Free Exercise and Establishment Clause cases as *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971); *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973); *Meek* v. *Pittenger*, 421 U.S. 349 (1975); *Grand Rapids School District* v. *Ball*, 473 U.S. 373 (1985); and *Edwards* v. *Aguillard*, 482 U.S. ___, 107 S.Ct. 2573 (1987).

Amici believe that religion has been, is, and must continue to be, a vital, vigorous and legitimate element in American public life; but that should be effected, not by state action, but by citizen action within the private sphere. There are many ways in which citizens, individually and in voluntary private groups of their own choosing, can express their religious views, commitments, symbols and aspirations without employing or seeking to employ the machinery and passive sponsorship of the state for their free exercise of religion. Government display of unadorned religious symbols at the very seat of government is a departure from that guiding principle and a violation of the Establishment Clause of the First Amendment.

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Nos. 87-2050, 88-90, 88-96

IN THE

Supreme Court of the United States

October Term, 1988

COUNTY OF ALLEGHENY, *et al.*,

Petitioners,

vs.

AMERICAN CIVIL LIBERTIES UNION
GREATER PITTSBURGH CHAPTER, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF THE AMERICAN JEWISH COMMITTEE, THE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A., THE UNION OF AMERICAN HEBREW CONGREGATIONS, THE COUNCIL ON RELIGIOUS FREEDOM, AND AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

This brief is submitted with the consent of the parties.

Statement of the Case

Amici adopt and incorporate by reference the Counter-Statement of the Case set forth in respondents' Brief in Opposition to petitioners' Petition for a Writ of Certiorari. The opinion of the court of appeals is reported at 842 F.2d 655. The rulings of the district court are unreported.

Summary of Argument

This Court has frequently acknowledged that our Establishment Clause jurisprudence is comprised of a melange of compli-

cated holdings that, at times, perplex governmental officials seeking guidance in the performance of their duties. Two justices have even suggested that this jurisprudence is "embarrassing." *See, e.g., Edwards* v. *Aguillard*, 482 U.S.___, 107 S.Ct. 2573, 2607 (1987) (Scalia, J., dissenting, joined by Rehnquist, C.J.). Although many decisions have been fractured, with slim majorities themselves affected by concurrences, one basic proposition that unifies the Court is that "no fixed, *per se* rule can be framed for every Establishment Clause case." *Lynch* v. *Donnelly*, 465 U.S. 668, 678 (1984); *see also Lynch*, 465 U.S. at 694 (O'Connor, J., concurring) ("Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion"); *Lynch*, 465 U.S. at 696 n.2 (Brennan, J., dissenting, joined by Marshall, Blackmun and Stevens, JJ.) (agreeing that "no single formula can ever fully capture the analysis that may be necessary to resolve difficult Establishment Clause problems").

The case at bar presents still another twist on the "creche dilemma" that was before this Court several years ago, and that has, to this day, continued to plague officials and jurists throughout the country. In this matter, the religious symbols displayed—a creche and a menorah—were located, not in a private park open to the public (as in Pawtucket), but at the very seat of Government (County Courthouse and Municipal Building). The Third Circuit Court of Appeals thus acted well within its jurisdiction in applying the analysis of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), as amplified through *Lynch*, to find that the religious displays erected by the County of Allegheny (the "County") and the City of Pittsburgh (the "City") conflict with the Establishment Clause of the First Amendment to the United States Constitution. In reaching its conclusion that the City and County impermissibly acted to advance religion (in violation of the second prong of the *Lemon* test), the court of appeals appropriately examined the salient factual differences between this case and *Lynch*, fulfilling the directive of this Court that each case be viewed in its own setting.

First, unlike the display in *Lynch*, "[e]ach display [here] was located at or in a public building devoted to core functions of government and each was placed at a prominent site at the public building where visitors would see it." 842 F.2d at 662. Further,

both government buildings at issue herein house courtrooms, compelling attendance at the displays by many people who might otherwise choose to avoid them.

Second, the creche and menorah at issue here were not subsumed by a larger display of secular items. Thus, unlike the display in *Lynch*, the religious significance of those sectarian symbols is not negated by their context and the message the City and County necessarily communicate is, at least, one of implicit endorsement of Christianity and Judaism. Irrespective of the government's actual purpose, such public perception of government endorsement of particular sects requires the invalidation of that government practice. *Lynch*, 465 U.S. at 691-92 (O'Connor, J., concurring).

Equal access for the symbols of other faiths is not a solution to that dilemma. "Separation [of church and state] is a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them all equally." *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203, 227 (1948) (opinion of Frankfurter, J.). Notions of accommodation of religion are not properly implicated where, as here, neither inclusion of a creche by the County in its holiday display nor inclusion of a menorah in the City's display is necessary to accommodate religious expression. There is simply no religious need to display religious symbols of any faith in government buildings.

Finally, as an alternative to the "line-drawing" analysis arguably necessitated by *Lynch*, *amici* respectfully suggest that the rationale of that decision be reexamined. Prior Establishment Clause cases, while recognizing the role that religion plays in American life, and approving references to, and accommodation of, religion, nonetheless did so in a "non-denominational" manner. In allowing students to be released from public school for religious training, neither government nor this Court was asked to ordain that a particular religion be accorded special treatment. *Zorach* v. *Clauson*, 343 U.S. 306 (1952).

In *Lynch*, however, the Court broke with established precedent by allowing state sanction of a particular religion's sacred symbol, the creche. Here, this Court is being asked to overturn the decision below and now sanction the placement of two groups' religious symbols—Christianity's creche and Judaism's

menorah—at the heart of the City and County government center. If any one precept emerges from the welter of decisions before us, it is that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson* v. *Valente*, 456 U.S. 228, 244 (1982). Because the effect of *Lynch* is to produce just that result, the decision should be overruled.

ARGUMENT

I

THE COURT OF APPEALS FOR THE THIRD CIRCUIT CORRECTLY HELD THAT IN PERMITTING THE PLACEMENT OF THE CRECHE AND MENORAH, THE CITY AND COUNTY HAVE IMPROPERLY ADVANCED OR ENDORSED RELIGION IN CONTRAVENTION OF THE SECOND PRONG OF THE LEMON TEST

A. The Court of Appeals Properly Examined the Challenged Placement of Religious Symbols Under the Lemon Test

There can be no question, and the Third Circuit Court of Appeals did not dispute, that "the starting point of our analysis should be *Lynch* v. *Donnelly*." 842 F.2d at 659. However, as recognized by the court of appeals, that decision was rendered by a "sharply divided" Court, *id*., and "has by no means put to rest issues involving use of religious decorations at the Christmas season nor has it foreshadowed any abandonment of the *Lemon* test which the Supreme Court continues to employ." *Id*. at 660 (citations omitted).[1] Accordingly, the court of appeals carefully examined the creche and menorah at issue here and applied the three-pronged test of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), the same test used by this Court in *Lynch*.

In applying that test, it first found that the second prong of the *Lemon* test is the one most readily violated, "as a public entity usually is able to articulate some secular purpose for a display

[1] The court of appeals also noted that "probably because the opinion [in *Lynch*] was tied so closely to the facts involved and because of the nature of the issues, there has been considerable post-*Lynch* litigation with the judges as well as the litigants at odds." 842 F.2d. at 660.

(first prong) and the mere placement and storage of a display will involve little entanglement (third prong) of government and religion." 842 F.2d at 661-62. Since "the impact of the display must be judged objectively," however, "the use of a religious symbol in a display on public property or by a public entity may well be deemed an endorsement of religion regardless of an entity's stated reasons for its placement. . . ." 842 F.2d at 662.

With respect to the second prong, the court held that six variables should be considered in deciding whether a display has the effect of advancing or endorsing religion:

> (1) the location of the display; (2) whether the display is part of a larger configuration including nonreligious items; (3) the religious intensity of the display; (4) whether the display is shown in connection with a general secular holiday; (5) the degree of public participation in the ownership and maintenance of the display; and (6) the existence of disclaimers of public sponsorship of the display.

Id. Having considered these criteria, the court of appeals concluded that "by permitting the creche and the menorah to be placed at the buildings the city and county have tacitly endorsed Christianity and Judaism and have therefore acted to advance religion." *Id.*

Appellants, as well as the dissenting judge in the court of appeals, take issue with the majority's (and various other circuit courts') post-*Lynch* examination of seasonal creche displays under the *Lemon* test. *See, e.g.*, Brief of Petitioner, County of Allegheny ("County Br.") at 12-13; Brief for the United States as *Amici Curiae* Supporting Petitioner ("U.S. Br.") at 5; *see also ACLU* v. *County of Allegheny*, 842 F.2d at 669 (Weis, J., dissenting). However, notwithstanding this Court's admonition in *Lynch* that "[w]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area," 465 U.S. at 679, it was the *Lemon* test that this Court applied in *Lynch*. *See Lynch*, 465 U.S. at 679-85. Moreover, this Court has continued to endorse the use of that test, whatever its limitations. *See Bowen* v. *Kendrick*, __ U.S. __, 108 S.Ct. 2562 (1988); *Edwards* v. *Aguillard*, 482 U.S. __, 107 S.Ct. 2573, 2576-78 (1987); *Wallace* v. *Jaffree*, 472 U.S. 38, 55-61 (1985).

Further, this Court never explicitly held that its decision in *Lynch* was intended to end for all time questions concerning the constitutionality of creche displays during the Christmas season. In fact, much of the language of the opinion, as well as the fact-specific nature of these cases, suggest the opposite.[2] Hence, there is no merit in the suggestion by appellants or the Solicitor General that the court of appeals should not have "proceeded to make its own application of the three-prong test of *Lemon* v. *Kurtzman* to the facts of this case." (U.S. Br. at 5.)

B. The Placement of the Creche and Menorah at Seats of Government Distinguishes this Case from Lynch

In reaching its conclusion that the City and County acted to advance religion, the court of appeals distinguished *Lynch* in a number of respects. First, it noted that here, unlike the display in *Lynch*, "[e]ach display was located at or in a public building devoted to core functions of government and each was placed at a prominent site at the public building where visitors would see it." 842 F.2d at 662. In fact, the County Courthouse in which the creche was displayed houses the County's executive officers, its commissioner, controller, treasurer and sheriff, as well as some of its criminal and civil courts. The City-County Building, on the front steps of which the menorah was placed, houses the offices and chambers of the Mayor and City Council, the office of the City Treasurer, the County Prothonotary (Clerk), the marriage license bureau and the Register of Wills, as well as the principal county civil trial courts, the Supreme and Superior Courts.

While appellants argue that *Lynch* was not intended to be given a narrow application dependent on the physical location of a display (Brief of Petitioner, City of Pittsburgh ("City Br.") at 17; County Br. at 21-23; *see also* U .S. Br. at 8, 14), there is ample authority in the opinion itself for the opposite conclusion. *See, e.g.*, 465 U.S. at 671; 465 U.S at 692-93 (O'Connor, J., concurring)

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[2] *See, e.g., Lynch,* 465 U.S. at 678 ("in each case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed"); 465 U.S. at 686 ("[t]he presence of the creche *in this display* [does not] violate[ ] the Establishment Clause . . ."); 465 U.S. at 692, 694 (O'Connor, J., concurring) (referring to the "government's display of the creche *in this particular physical setting*" and stating that "[e]very government practice must be judged *in its unique circumstances* to determine whether it constitutes an endorsement or disapproval of religion") (emphasis added).

("These features combine to make the government's display of the creche *in this particular physical setting* no more an endorsement of religion than [other] governmental 'acknowledgments' of religion [upheld by the Court]") (emphasis added). *See also* 465 U.S. at 695 (Brennan, J., dissenting) ("[t]he Court reaches an essentially narrow result which turns largely upon the particular holiday context in which the City of Pawtucket's nativity scene appeared").

Moreover, the distinction among religious symbols, as to their acceptability, dependent upon whether they are located on private property, public parks or government buildings, is clearly supported by earlier Supreme Court precedent. In *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203 (1948), this Court held that religious teachers employed by private religious groups could not, consistent with the Establishment Clause, come into public school buildings during school hours to provide religious instruction. This Court stated:

> Here not only are the state's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory public school machinery. This is not separation of Church and State.

333 U.S. at 212.

In contrast, this Court upheld in *Zorach* v. *Clauson*, 343 U.S. 306 (1952), the release of school children from the public schools in order to obtain religious instruction provided on *private* property. This Court stated:

> This "released time" program involves neither religious instruction in public school classrooms nor the expenditure of public funds. . . . The case is therefore unlike *McCollum* v. *Board of Education* [citation omitted] which involved a "released time"program from Illinois. In that case the *classrooms* were turned over to religious instructors. We accordingly held that the program violated the First Amendment. . . .

Id. at 308-09 (emphasis added); *see also* 343 U.S. at 316 (Black, J., dissenting) ("I see no significant difference between the invalid

Illinois system and that of New York here sustained[ ] [e]*xcept for the use of the school buildings in Illinois* . . . "](emphasis added).

Obviously, then, the public/private land distinction advanced here and adopted by the court of appeals herein (as well as by the Sixth Circuit in *ACLU* v. *City of Birmingham*, 791 F.2d 1561 (6th Cir.), *cert. denied*, 479 U.S. 939 (1986); and by the Seventh Circuit in *American Jewish Congress* v. *City of Chicago;* 827 F.2d 120 (7th Cir. 1987)) does not, as suggested by the County, "require this Court to give special significance to a factor treated as essentially irrelevant in prior cases." (County Br. at 26).

Nor is there any merit to the argument of the Solicitor General that the "effect of the display . . . [is] the same regardless of location" (U.S. Br. at 8, 15). Indeed, placement of religious symbols such as the creche and menorah at the seat of government, rather than on private or even mere public park land,[3] results all the more markedly in the government's "imprimatur of approval" being placed on the particular religious beliefs exemplified by the symbols. *Cf. Lynch*, 465 U.S. at 702 (Brennan, J., dissenting). As stated by the Court of Appeals for the Seventh Circuit in *American Jewish Congress* v. *City of Chicago*, 827 F.2d at 128:

> The presence of the government in Chicago's City Hall is unavoidable. The building is devoted to government functions: for example, both city and county government offices are located there, and the City Council holds its meetings there. Because City Hall is so plainly under government ownership and control, every display and activity in the building is implicitly marked with the stamp of government approval. The presence of a nativity scene in the lobby, therefore, inevitably

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[3] After all, public park land or "commons" have been used for religious meetings and observance since time immemorial, subject only to reasonable regulation as to time, place and manner. *See, e.g., Hague* v. *CIO*, 307 U.S. 496, 515 (1939); *Heffron* v. *Internat'l Soc. for Krishna Consciousness*, 452 U.S. 640 (1981). The crucial distinction between a traditional public forum, like a park, and the seat of government is suggested by *Widmar* v. *Vincent*, 454 U.S. 263 (1981), a case central to Chabad's argument for inclusion of a menorah in the City's holiday display. *See* Brief for Petitioner Chabad ("Chabad Br.") at 24, 30-31. In *Widmar*, this Court held that a state university, which makes its facilities generally available for the activities of registered student groups, may not close its facilities to a registered student group desiring to use the facilities for religious

(footnote continued on next page)

creates a clear and strong impression that the local government tacitly endorses Christianity.

The message of endorsement is equally powerful on the symbolic level. Like the nativity scene itself, City Hall is a symbol—a symbol of government power. The very phrase "City Hall" is commonly used as a metaphor for government. A creche in City Hall thus brings together Church and State in a manner that unmistakably suggests their alliance. The display at issue in this case advanced religion by sending a message to the people of Chicago that the city approved of Christianity.

Additionally, since both government buildings at issue herein contain courtrooms and offices for essential city and

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worship and discussion. The Court, in applying the second prong of the *Lemon* test, stated:

> First, an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices. . . . Second, the forum is available to a broad class of nonreligious as well as religious speakers. . . . The provision of benefits to so broad a spectrum of groups is an important index of secular effect.

454 U.S. at 274; 454 U.S. at 280-281 (Stevens, J., concurring in judgment) ("the record discloses no danger that the University will appear to sponsor any particular religion").

In contrast, and unlike the public park at issue in *McCreary* v. *Stone*, 739 F.2d 716 (2d Cir. 1984), *aff'd by equally divided court sub nom., Bd. of Trustees of Village of Scarsdale* v. *McCreary*, 471 U.S. 83 (1985), the Allegheny County Courthouse, and the Grand Staircase in particular, is not an open public forum or traditional marketplace of ideas. *See Widmar*, 454 U.S. at 271 n.10 ("It is the avowed purpose of [the university] to provide a forum in which students can exchange ideas.") In addition, the duration of the display, its size, and permanence all serve to distinguish the creche and menorah from an instance of transitory speech tolerated by the state, as in *Widmar*, and make it more akin to the imposition of official doctrine endorsed by the state. Notably, although some art and culture displays are exhibited in the County Courthouse during the year, according to the Director of the Bureau of Cultural Programs, no displays other than the creche had appeared on the Grand Staircase—the most beautiful and focal point of the building's interior—during her tenure. Joint Appendix ("J.A.") 201-04.

Where religious groups dominate even an open forum, the advancement of religion becomes the forum's unconstitutional primary effect. *Widmar*, 454 U.S. at 275. Where the forum is a building devoted exclusively to the administration of the law and government, as here, the impermissible effect of the religious display is that much greater.

county services, bringing a good many people into contact with the City's and County's displays who might otherwise choose to avoid them (*see* J.A. 110-12, 124-25), there is the same element of compulsion here as was found to invalidate the "released time" program in *McCollum*, 333 U.S. at 212.[4] Accordingly, the court of appeals correctly held that the placement of the creche and menorah at prominent sites at "public building[s] devoted to core functions of government" was a significant factor distinguishing this case from *Lynch* v. *Donnelly*, 842 F.2d at 662.

C. The Fact that the Creche and Menorah Here Were Unadorned and Not Part of Some Larger, Secular Display, Distinguishes this Case from Lynch

The court of appeals also distinguished *Lynch* on the ground that the creche and menorah at issue here could not "reasonably be deemed to have been subsumed by a larger display of non-religious items," 842 F.2d at 662, while the Pawtucket creche was part of a Christmas display including, *inter alia*, a Santa Claus house, reindeer pulling Santa's sleigh, a cut-out clown, a Christmas tree, and a talking wishing well (*Lynch*, 465 U.S. at 671). *See also ACLU* v. *City of Birmingham*, 791 F.2d at 1566 (prohibiting display of "unadorned creche" not "surrounded by a multitude of secular symbols of Christmas").

This is a legitimate basis for distinction, insofar as the message of "endorsement" of the clear religious significance of the creche—acknowledged by this Court in *Lynch* [5]—is not so easily "negated" (465 U.S. at 692 (O'Connor, J., concurring)) when the "overall holiday setting" (*id.*), as at the County Courthouse, in-

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[4] This Court stated in *McCollum* that "[t]he public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny." 333 U.S. at 231 (opinion of Frankfurter, J.). The same can certainly be said for City Hall and the courts in our country.

[5] *See, e.g., Lynch*, 465 U.S. at 680-81, 685-88; *see also* 465 U.S. at 692 (O'Connor, J., concurring) ("the religious and indeed sectarian significance of the creche . . . is not neutralized by the setting . . .); 465 U.S at 711 (Brennan, J., dissenting) ("The essence of the creche's symbolic purpose and effect is to prompt the observer to experience a sense of simple awe and wonder appropriate to the contemplation of one of the central elements of Christian dogma—that God sent His Son into the world to be a Messiah"); 465 U.S. at 727 (Blackmun, J., dissenting) (referring to the creche as a "sacred symbol").

cludes only the creche itself.[6] Since the menorah placed on the steps of the City-County Building was similarly "unadorned" by non-religious items which might have combined to "negate" the message that the City of Pittsburgh endorses Judaism or the Judeo-Christian religions,[7] the court of appeals' conclusion that the menorah was distinguishable from the display upheld in *Lynch* was also proper.

Appellants and the United States all argue vigorously that a rule of law that depends on "marginal differences in holiday displays" (U.S. Br. at 17) like the existence of a "cut-out clown, reindeer, or talking wishing well" (*id.*), is ill-advised. Similarly, the dissenting judges in *American Jewish Congress* v. *Chicago*, 827 F.2d at 130 (Easterbrook, J., dissenting), and *ACLU* v. *City of Birmingham*, 791 F.2d at 1569 (Nelson, J., dissenting), argue that it is "appalling" for the courts to mandate "how much paganism" is required in holiday displays in order for them to pass constitutional muster. While admiring the eloquence of these statements, we are unsympathetic to the position embodied in them.

First, distinctions based on such differences in displays only become significant when they are not "marginal." Thus, questions concerning whether a display contains two reindeer or three, or a candy cane, a reindeer and a Santa Claus, will not, as feared by the County, "artificially elevate[ ] trifling details about the particulars of a municipal display into matters of high and vital con-

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[6] The Solicitor General's attempt to persuade this Court that the red and white poinsettia plants which surround the creche here at issue are in some way equivalent to the secular objects adorning the Pawtucket creche, is wholly without merit. Indeed, an examination of the photographs of the creche (Joint Exhibit Volume ("J.E.") 6-8) reveals that, if those plants have any impact on the display at all, it is to draw one's attention all the more to the nativity scene. Such floral settings, moreover, are commonly used in Catholic church creche displays. (J.A.78). Thus, the poinsettias certainly cannot be equated, in terms of "chang[ing] what viewers may fairly understand to be the purpose of the display" (*Lynch*, 465 U.S. at 692 (O'Connor, J., concurring)), with a typical museum setting.

[7] The placement of the menorah next to the Christmas tree does not accomplish this "negation." The Christmas tree is, for present purposes, considered a secular symbol of Christmas. Its placement next to the menorah—in our view a religious symbol of Chanukah (*see* discussion, *infra*, at subsection D)—if anything, emphasizes the independent significance of each as representing separate and distinct holidays, and cannot be said to negate the endorsement inherent in the display of the menorah.

stitutional importance" (County Br. at 18). Rather, only questions concerning whether a display contains a religious symbol as the most prominent or only item, as would the display of a creche or menorah standing alone, or whether, conversely, it contains both religious and non-religious symbols, need be passed upon.

Second, the importance of distinctions based on content is suggested by this Court's analysis in *Lynch*. This Court not only described the secular contents of the display, 465 U.S. at 671, but went further and described the impact of the display on the community. This Court stated, "the display brings people into the central city, and serves commercial interests and benefits merchants and their employees. . . ." 465 U.S. at 685. While the Court's point, in the cited statement, was that the religious character of the display was not thereby undermined, it is still significant that none of the same commercial interests is served here.

Moreover, even if the particular content of the Pawtucket display, *i.e.*, the fact that it contained non religious symbols, was not intended by the majority of this Court to form the basis for the *Lynch* holding, such a limitation is necessary in order to preserve the integrity of that decision's reasoning. As expressed by the Seventh Circuit Court of Appeals in *ACLU* v. *City of St. Charles*, 794 F.2d 265 (7th Cir.), *cert. denied*, 479 U.S. 961 (1986), which considered the nativity scene a "mixed case:"

> The Nativity scene is an unmistakable reminder of the holiday's religious origins. Yet it does not follow that its inclusion in a Christmas display lacks secular purpose, or that its predominant effect is to promote Christianity. *See Lynch* v. *Donnelly, supra*, 465 U.S. at 680-82. As Justice O'Connor explained in her concurring opinion in *Lynch*, once it is conceded that the government can celebrate Christmas as a public holiday,despite its religious origins and continued religious significance to believing Christians, the inclusion of the Nativity scene in the celebration is seen to serve a secular purpose—"celebration of a public holiday with traditional symbols," *id.* 465 U.S. at 693, 104 S.Ct. at 1369—and therefore "cannot fairly be understood to convey a message of government endorsement of religion." *Id.* One may question whether the second proposition follows from the first; the

> purpose could be secular, but the dominant effect to promote Christianity. Yet maybe not, *where as in the Lynch case the Nativity scene is mixed in with the other traditional symbols of Christmas, most of which either never had or have lost their Christian connotations.*

794 F.2d at 272 (emphasis added). In that court's view, with which we concur, the foundation of the *Lynch* decision—that the celebration of a public holiday (even one with religious origins) with traditional symbols will not be understood as conveying a message of endorsement—fails when the only "traditional symbol" displayed is one with such a strong Christian connotation. Finally, to the extent that an examination of displays on a case-by-case basis is required, such a result is mandated by the *Lynch* decision itself. *Lynch* did not determine for all time that all nativity scenes are permissible when displayed in the month of December, much less that all Christmas or all religious symbols are so permissible. Then Chief Justice Burger, writing for the majority, stated: "In each case, the inquiry calls for line-drawing; no fixed, *per se* rule can be framed. The Establishment Clause . . . erects a 'blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.'" 465 U.S. at 679. Chief Justice Burger also framed the issue before the Court as whether "the presence of the creche in *this display* violates the Establishment Clause. . . ." *Id.* at 686 (emphasis added).

Thus, the Court took on the responsibility for determining, on an individual basis, whether the effect of the symbol or display at issue is to promote the religion it represents. The instant case, in which the County of Allegheny argues that its creche and the City of Pittsburgh argues that its menorah—both of which appear in radically different contexts than the creche upheld in *Lynch*—do not have such an effect, is a perfect example. Accordingly, the criticism advanced by appellants, that the need for a case-by-case analysis negates a distinction based on content, is misplaced.

D. The Court of Appeals Correctly Held That the Creche and the Menorah Are Associated With Religious Holidays and Would Be Viewed As Pertaining to a Particular Religion

In reaching its conclusion that by permitting the display of the creche and menorah, the City and County had tacitly en-

dorsed Christianity and Judaism, the court of appeals found that "both the creche and the menorah are associated with religious holidays and would be viewed as pertaining to a particular religion." 842 F.2d at 662. With respect to the creche, there can be little doubt about its religious significance. As recognized by this Court in *Lynch*, the creche, even when surrounded by other, secular symbols of Christmas, remains a religious symbol. Indeed, it is difficult to imagine a symbol which more quintessentially embodies the doctrine underlying the Christian faith itself than the creche—which celebrates, in adorational terms—the birth of Jesus as the Son of God.

With respect to the menorah, however, Chabad, which represents a small segment of the Jewish community known as the Lubavitch (*see* J.A. 247, 250-53), takes a different view. Presumably in an attempt to have the placement of the menorah deemed constitutional even in the event that this Court adopts the position advanced here—that a creche, *standing alone*, as opposed to one surrounded by secular symbols, will not pass constitutional muster because of its clear, "unnegated" religious significance—and perhaps even in the event that this Court reconsiders its decision in *Lynch* and holds that a municipality may not display a creche of any kind (*see* Point III, *infra*), Chabad argues that the menorah is not a religious symbol.[8] Specifically, it argues that the menorah "symbolizes not only a particular religious observance

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[8] We presume that this is Chabad's motive because, simply stated, we can imagine no other reason why a fundamentalist group like Chabad would resort to taking a position so contrary to its own basic tenets, and so offensive to other Jews. Since Chabad has not contested the viability of the *Lynch* decision, as we do (*see* Point III), and since that decision would presumably protect a municipality's display of any similarity adorned holiday display, at least as long, one supposes, as the symbol were not *more* religious than a creche (*cf. ACLU* v. *City of St. Charles*, 794 F.2d 265), then we can understand Chabad's desire to publicize that the menorah is not *as religious* a symbol as the creche. But the only conceivable explanation for their going further, and claiming that the menorah has no religious significance at all, is that they are attempting to remove that symbol completely from the *Lynch* domain, and equate it instead with a symbol which appears not to need judicial approval, *i.e.*, the Christmas tree. We respectfully suggest that Chabad's position, however creative, is disingenuous, at best.

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unique to Judaism, but also cultural and national aspirations, as well as universal human values."[9] We strongly disagree.

First, notwithstanding Chabad's attempt to equate a menorah with a Christmas tree (J.A. 44), the menorah is not and never has been a "holiday decoration" which must have its place with the others of the season. The menorah is associated with Chanukah, a religious holiday commemorating the rededication in 165 B.C. of the second Holy Temple, after recapturing it from the Syrian Greeks.[10] The word "Chanukah," in fact, means "rededication." This holiday, while perhaps not the most important on the Jewish calendar, is still significant enough that, during its observance, pursuant to religious law, adherence to certain religious customs and commandments reflecting sadness—such as delivering public eulogies—ceases and the Hallel, a prayer marking Jewish festivals, is recited. *A Maimonides Reader*, 118-19 (Twersky, ed. 1972).

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In this regard, we also note the flaw in the City of Pittsburgh's criticism of the court of appeals' position on the menorah. The City states: "If a creche which depicts a central religious event of this country's dominant religion does not advance religion and violate the Establishment Clause, a Chanukah menorah, which is both a religious and cultural symbol of a minority religion's feast commemorating a battle, cannot advance religion and violate the Establishment Clause" (City Br. at 15). However, the court of appeals did not hold, and neither we nor respondents argue herein, that the creche is constitutional while the menorah is not; on the contrary, we are in agreement with the court of appeals that neither is permitted under the Establishment Clause. Conversely, in those contexts where, under *Lynch*, a creche would be permissible (however unwisely), a menorah would be permissible as well.

[9] Chabad even accepts—indeed, advances—the finding of the district court that the menorah "has no particular religious significance when placed in a public location beyond signifying a 'Light to the World' somewhat like the Christmas message 'Peace on Earth, Goodwill to Men'" (Chabad Br. at 30.).

[10] Rabbi Mordecai M. Kaplan, one of the preeminent Jewish scholars of the 20th century and founder of the Reconstructionist branch of Judaism has noted that:

> The striking feature of the celebration of Hanukkah is the fact that, although the occasion which it commemorates was incidental to a successful war of independence fought against an oppressive foreign ruler, that occasion itself was neither a victory on the field of battle nor a political transaction that gave official recognition to the hard-won independence of Judaea. Hanukkah commemorates the rededication of the Temple at Jerusalem to the God of Israel after it had been deliberately defiled by the Grecian rulers.

M. Kaplan, *The Meaning of God in Modern Jewish Religion* (1937) at 330.

The menorah itself is, as explained by Rabbi Chaim Dov Keller recently in the November 1988 issue of the Agudath Israel's publication The *Jewish Observer*:

> a *cheftza shel mitzva*—an article used for a *mitzva* [good deed ordained by religious law]. When we perform the *mitzva* as the *halacha* [religious law] requires, then we have brought about a *pirsumei nisa*—a proclamation of a Divine miracle. This is the will of the Almighty—that we perform the *mitzva* as our Sages prescribed.

Keller, *Letter to the Editor*, Jewish Observer, Nov. 1988 at 39. In accordance with this religious purpose, as the record below reflects, during Chanukah, Jews are obligated to light a menorah nightly, accompanied by the recitation of prayers. The English translation of the traditional Hebrew Chanukah blessing recited at the City-County menorah lighting was: "We are blessing God who has sanctified us and commanded us with mitzvot and has told us to light the candles of Hanukkah." J.A. 306.

Chabad's own witness admitted on cross-examination that displaying and lighting the Chanukah menorah outside the home is in fulfillment of the command of the *Shulchan Aruch*, the Code of Jewish Law, "*pirsumay nissah*"—"mak[e] public the miracle." (J.A. 266-71).[11] Thus, notwithstanding Chabad's attempt to persuade the Court that this lighting "does not constitute a 'religious' act," *see* Declaration of Rabbi Yisroel Rosenfield (J.A. 43), it is clear that the lighting of the menorah is an integral part of the observance of Chanukah and the effect of such lighting, and of the menorah itself, is to "send a message . . . to adherents [of the Jewish faith] that they are insiders, favored members of the political community." *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

In sum, a menorah may not be a "sacred object" in the same sense as a Torah Scroll, but Chabad simply goes too far in insisting that the menorah "is not an inherently religious object" and that it has "no religious significance whatever" (Chabad Br. at

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[11] The Shulchan Aruch was compiled by Yosef Caro, a Talmudic scholar, in the mid-sixteenth century and is considered an authoritative text. *See* J.A. 256. *See also Babylonian Talmud*, Tractate "Sabbath" 21b-22a (Rashi, the preeminant commentator on the Talmud, the authoritative work of halachic Jewish tradition, points out that the menorah, at Chanukah, is to be openly displayed, to enhance public recognition of the miracle that was wrought).

25). While a menorah may, as Chabad claims, not be analogous to a creche—which symbolizes the central underpinnings of Christianity itself—it is the central religious symbol of Chanukah. As correctly held by the court of appeals, "the general public would [not] be aware of the religious fine point made by Chabad and thus [would not] view the display of the menorah as a lesser endorsement of religion than that of a Torah Scroll or other object regarded as sacred." 842 F.2d at 662.

At a minimum we would urge this Court to affirm the court of appeals' holding that "regardless of the lack of religious significance of a menorah its sectarian character is clear and thus even though it may not be regarded as a sacred object its placement was an endorsement of religion." *Id.*

E. The Placement of the Creche and Menorah in this Case Convey A Message of Endorsement of Religion Within the Meaning of Justice O'Connor's Concurrence In *Lynch*

Distinguishing the creche and menorah at issue here from the Pawtucket holiday display upheld in *Lynch* is consistent with Justice O'Connor's concurring opinion in that case. In that opinion, Justice O'Connor suggested an approach which examined whether government conduct "endorsed" or "disapproved" of religion:

> What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community.

465 U.S. at 692.

> Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.

Id. at 688.

With respect to the creche at issue in *Lynch*, Justice O'Connor determined that "although the religious and indeed, sectarian

significance of the creche . . . is not neutralized by the setting, the overall holiday setting changes what viewers may fairly understand to be the purpose of the display—as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content." *Id.* at 692.

The differences between the displays at issue here and the one involved in *Lynch*, however, are differences which significantly influence the "effect" of such displays on the average observer who is not an adherent of the represented faiths. Both the lack of secular symbols adorning the displays at issue here and their placement on government headquarters differentiate this case from *Lynch*, insofar as they severely undermine the extent to which the religious significance of the displays is "negated."

As stated by the Seventh Circuit Court of Appeals in *ACLU* v. *City of St. Charles*, 794 F.2d at 271, "the more sectarian the display, the closer it is to the original targets of the [Establishment] clause, so the more strictly is the clause applied." Where, as here, the displays are unadorned by non-religious objects which could, if present, combine to "change[ ] what viewers may fairly understand to be the purpose of the display," *Lynch*, 465 U. S. at 692, and where, as here, they are placed at the very seat of government—indeed, at extremely prominent, even prime, locations at those government buildings[12]—there is simply no barrier of the kind found in *Lynch* to the government's communication of a message of endorsement of religion. The result, inescapably, is that adherents of the faiths represented by the creche and menorah—Christians and Jews—will receive a message that "they are insiders, favored members of the political community," and that non-adherents will receive "the opposite message." *Id.* at 688.[13]

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[12] J.A. 176, 185-86, 206-07.

[13] The record in this case clearly supports this conclusion. Howard Elbling, a lawyer and clerk to a Common Pleas Judge, regularly was required to appear at the Allegheny County Courthouse in order to perform duties of his clerkship and

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Equal access for the symbols of other faiths is not an escape from this fundamental concern. "Separation [of church and state] is a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them all equally." *McCollum*, 333 U.S. at 227 (opinion of Frankfurter, J.). First, while the City and the County may open their innermost precincts to the displays of all sects, not all may be willing or able to provide such displays. The record is clear that Moslems do not depict their concept of God through representational paintings, sculpture or similar displays. J.A. 110-11. Atheists, certainly, would be hard pressed to propose a symbol comparable to the creche or the menorah. Other sects, fearing the trivialization of their symbols, may decline to participate.[14] Persons belonging to those non-participating sects will be made to feel "outsiders, not full members of the political community," *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring). Irrespective of the government's actual purpose, such public perception of government endorsement of particular sects requires the invalidation of that government

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practice. Mr. Elbling, a Jew, testified that he had passed the creche four to six times a day, perhaps thirty to thirty-five times in all (J.A. 124), that he could not get to work by his normal route without passing it, and that each time he felt more offended (J.A. 125). The creche:

> just evoked from me a memory of middle ages time when my people were persecuted and forced to live in guettos [sic]. You know, as a, as an American, as a tax paying citizen, I don't think that I have to be reminded of that as I walk into a public building.

J.A. 125; *see also* J.A. 128.

[14] This concern has been eloquently stated by a leading Methodist clergyman:

> [Some propose] to reassert religious values by posting the Ten Commandments on every school-house wall, by erecting cardboard nativity shrines on every corner, by writing God's name on our money, and by using His Holy Name in political oratory. Is this not the ultimate in profanity.
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> • • •
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> What is the result of all this display of holy things in public places? Does it make the market-place more holy? Does it improve people? Does it change their character or motives? On the contrary, the sacred symbols are thereby cheapened and degraded. The effect is often that of a television commercial on a captive audience—boredom and resentment.

Kelley, *Beyond Separation of Church and State*, 5 J. Church & State, 181, 190-91 (1963). *See also Marsh* v. *Chambers*, 463 U.S. 783, 804 & n.16 (1983) (Brennan, J., dissenting).

practice. *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring) ("What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion.").

Second, the proffered "solution" of equal access for all religions to the seat of government for the display of their symbols will inevitably lead to a heightened and impermissible entanglement between religion and state. Government efforts to accommodate the demands of religious groups for inclusion of their symbols will result in tensions between religious and civil authorities and among religious groups as the issues of placement, propriety and size of display are addressed, particularly where the display space available at the house of government, as here, is not unlimited. Competing efforts for this limited resource may "occasio[n] considerable civil strife ." *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. at 796. In addressing these administrative concerns, the government will also necessarily have to decide what constitutes a "religion," "[t]hus [creating] a governmental power to hinder certain religious beliefs by denying their character as such." *Zorach*, 343 U.S. at 318 n.4 (Black, J., dissenting).

Chabad argues for inclusion of the menorah as a symbol of "freedom of conscience and good will to all people" (Chabad Br. at 25), freed from religious connotations by its display in the context of the overall holiday setting . Yet, the religious nature of the menorah aside, to include the menorah based on the reasoning that the celebration of Chanukah each year coincides with the "Christmas holiday season" (*see* U.S. Br. at 19) is necessarily to exclude the symbols of other sects that do not celebrate year-end religious observances.

Hence the County and the City cannot physically or constitutionally "accommodate" all religions, nor are they permitted to embrace the symbols of some where the free expression of those sects' traditions and principles may find other, non-government assisted, outlets.[15]

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[15] Moreover, the very notion of placing religious symbols at the seat of local government as an "accommodation" of religion is, as Point II, *infra*, will show, a misapplication of notions of "accommodation" which are associated with free exercise doctrine.

II

NOTIONS OF "ACCOMMODATION OF RELIGION" ARE NOT PROPERLY IMPLICATED IN THIS CASE

In a long line of cases, this Court has held that "accommodation" of government is necessary to protect an individual's right to "freely exercise" his religious beliefs consistent with the First Amendment. *E.g., Sherbert* v. *Verner*, 374 U.S. 398 (1963). As stated by the Court in *Zorach*, however, "[i]t takes obtuse reasoning to inject any issue of the 'free exercise' of religion into the present case." 343 U.S. at 311.

From a constitutional perspective, of course, the notion of "accommodation" is properly associated with those cases where the carrying out of a religious belief would be subject to governmental penalty, or at least to deprivation of a public benefit, if there were not some adjustment in a generally applicable rule. In such cases, government must demonstrate that the purposes served by the challenged regulation are of compelling interest and can be served by no less restrictive means before it will be allowed to refuse some such adjustment. *E.g., Hobbie* v. *Unemployment Appeal Comm'n of Florida and Lawton & Co.*, 480 U.S. 136 (1987).

Neither inclusion of a creche by the County in its holiday display nor inclusion of a menorah in the City's display is necessary to accommodate individual religious expression.[16] *Lynch*, 465 U.S. at 717 (Brennan, J., dissenting). There are ample private forums away from the seat of government for the *public* display of religious symbols in recognition or celebration of the holidays with which they are associated. At those sites, the imprimatur of

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[16] The "free exercise" argument advanced by *amicus curiae* Concerned Women for America in support of petitioners is thus misplaced and the authority they cite is distinguishable from the instant case. *See* Concerned Women for America's Brief at 6-9.

In *Quick Bear* v. *Leupp*, 210 U.S. 50 (1908), this Court affirmed the constitutionality of federal payments made, pursuant to treaty, to a Native American tribe planning to use the funds for a Catholic school because to have denied them this chosen use of their own funds would have been to deny the tribe their sole opportunity to provide themselves a religious education. Here, government's refusal to display the creche or menorah would not similarly preclude the free exercise of religion.

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government is absent and the coercive effect of the display of such sectarian symbols at the seat of government is avoided.[17]

Further, even if we accept the City's and County's stated "secular" purpose, this Court has frequently held that government may not "employ religious means to reach a secular goal unless secular means are wholly unavailing." *School Dist. of Abington* v. *Schempp*, 374 U.S. 203, 294 (1963). *See also Wallace* v. *Jaffree*, 472 U.S. at 59; *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116, 122-23; *ACLU* v. *Rabun Co. Chamber of Commerce, Inc.*, 698 F.2d 1098, 1111 (11th Cir. 1983); *Gilfillan* v. *City of Philadelphia*, 637 F.2d 924, 930 (3d Cir. 1980), *cert. denied*, 451 U.S. 987 (1981). Here, the City's and County's stated purpose of marking the Christmas holiday and promoting good will could be adequately served without including a menorah or creche in their respective displays.[18]

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Bradfield v. *Roberts*, 175 U.S. 291 (1899), is also inapposite. There, as in *Tilton* v. *Richardson*, 403 U.S. 672 (1971), the question presented was the extent to which the government might rely upon sectarian institutions in providing clearly secular services. Here, the issue is the use of government facilities which advance religion, albeit for ostensibly secular purposes. Notably, the sectarian symbols which might be expected to adorn the government funded hospital additions in *Bradfield* (or the college buildings in *Tilton*) were far removed from the seat of government.

[17] The availability and importance of alternative private sites for the display of sectarian symbols is illustrated by community practice in Larchmont, New York. After more than 20 years of being displayed in front of the Village Hall, the Larchmont village creche was rotated among area churches. Local Christian clergy acknowledged that many Christians as well as non-Christians felt it was "inappropriate" to exhibit a symbol of the incarnation on public property.

> The clergy declared that the manger "goes to the center of the Christian orthodoxy: that the mystery of the divine reality becomes uniquely incarnate in a human life." For this reason, they said, "the clergy hold that the creche is not a universal but a sectarian, particularistic symbol, and that its appropriate place is not on tax-supported property, but in churches or on their properties and in our homes."

Rabinove, *Religious Symbols and Gov't: What's All the Fuss?*, Long Island Jewish World, December 2-8, 1983. Nevertheless, in the wake of *Lynch*, the local government voted to reinstate the creche display on the Village Hall lawn. *Cf. McCreary* v. *Stone*, 739 F. 2d at 720 (Village of Scarsdale, prior to *Lynch*, voted to deny requests to display creche on public property).

[18] In contrast, the furtherance of public appreciation of art and literature necessitates the display of religious objects in museums and the study of relig-

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While certain government action, prompted by a secular purpose, may advance religion, such is the inevitable consequence of the broad reach of both government and religion in our society. To pass constitutional muster, however, that action must be scrupulously neutral, promoting religion generally and incidentally, rather than as a "primary effect" of the action in question which, of course, would implicate the second prong of the *Lemon* test. *See Zorach* v. *Clauson*, 343 U.S. 306 (mandatory release time from school for off-campus religious instruction). *See also Walz* v. *Tax Comm'n*, 397 U.S. 664 (1970) (property tax exemption for religious institutions); *Tilton* v. *Richardson*, 403 U.S. 672 (construction grants for college buildings of church-sponsored institutions of higher learning combining secular and religious education).

Where permissible government practice coincides with a *particular* religious belief, the advancement, or in less precise parlance, "accommodation", of that belief is indirect and, as a practical matter, the result of government's taking into account common practice to further its secular goal. *See McGowan* v. *Maryland*, 366 U.S. 420 (1961) (upholding Sunday closing laws). Indeed, government recognition of Christmas Day as a public holiday does no more than reconcile the functioning of government institutions to a *de facto* common day of family gatherings and rest. *Lynch*, 465 U.S. at 710, 714-15, (Brennan, J., dissenting). *Marsh* v. *Chambers*, repeatedly invoked by Chief Justice Burger in *Lynch*, is not to the contrary.[19] The Court specifically found in *Marsh* "no indication that the prayer opportunity ha[d] been ex-

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iously inspired texts in schools. *Cf. Lynch*, 465 U.S. at 676-77. "Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view." *McCollum*, 333 U.S. at 236 (Jackson, J., concurring). That a creche or menorah may constitutionally be displayed in a government supported art gallery, however, does not compel the conclusion that an ostensibly secular purpose may justify their display in another mode, in another place.

[19] Significantly, in his opinion for the Court in *Marsh*, Chief Justice Burger relied upon the "unique history" of the appointment of paid legislative chaplains in upholding the constitutionality of that practice. *Marsh*, 463 U.S. at 786-92.

ploited [by the legislative chaplain] to proselytize or advance any one, or disparage any other, faith or belief." 463 U.S. at 794-95.[20]

In contrast, by providing a menorah to the City, Chabad, a fundamentalist Jewish group, seeks to further its "war against the forces of assimilation, helping Jews around the world rediscover the eternal truths of Torah Judaism." J.E. 20. Similarly, the organizational purpose of the Holy Name Society, "to promote veneration for the name of Jesus," (J.A. 73), clearly bespeaks its goal in providing a creche—a holy symbol of the Catholic faith [21]— to the County for government display. By involving themselves in the display of the menorah and the creche, respectively, at the very seat of government, the City and the County have undertaken to endorse, at least implicitly, those sectarian messages.[22] *See Stone* v. *Graham*, 449 U.S. 39, 41 (1980) ("avowed secular purpose is not [always] sufficient to avoid conflict with the First Amendment"); *Edwards* v. *Aguillard*, 107 S.Ct. at 2579 (1987) ("it is required that the [State's] statement of [secular] purpose be sincere and not a sham"). Their conduct in erecting those holiday displays does more than coincidentally harmonize with some religions; it impermissibly "aids religious groups to spread their faith." *McCollum*, 333 U.S. at 210. "The state should not be allowed to do for citizens what, in their rightful free exercise of religion, they are perfectly capable of doing for themselves." Rabinove, *The Constitution and the Creche*, Reform Judaism, Winter 1984-85 at 3.

III

IN LIGHT OF THE DIFFICULTIES INHERENT IN THE LYNCH ANALYSIS, THAT DECISION SHOULD BE REEXAMINED AND SET ASIDE

As demonstrated above, an affirmance of the decision of the Third Circuit Court of Appeals would be consistent with the deci-

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[20] Notably, Robert E. Palmer, the Nebraska Legislature's chaplain, did not, after 1980, offer prayers which were explicitly Christian; he characterized his prayers as "nonsectarian." *Marsh*, 463 U.S. at 793 n.14.

[21] Before the district court, Father Gregory Swiderski, a Catholic priest, testified that a nativity scene is "a Catholic sacramental, in that it is a representation of something holy," J.A. 72; it does not have any secular significance. J.A. 78, 134.

[22] The menorah at the City-County Building was lit nightly at which time a prayer invoking the name of God was recited by a rabbi. J.A. 280-81.

sion in *Lynch* v. *Donnelly*. However, there are some difficulties inherent in that decision which bear reflection. One of those difficulties is that its premise—that a clearly sectarian municipal celebration of the Christmas holiday is, when viewed in the context of the season, permissible because Christmas is a national holiday (*i.e.*, a holiday with "secular aspects")—gives rise to arguments like that of the Solicitor General herein that a menorah is permissible because it "is part of the Jewish celebration of Chanukah, which falls each year within the Christmas holiday season." U.S. Br. at 9, 19. The Solicitor General cites the fact that private and governmental entities are

> accommodating and recognizing celebrations of Christmas and Chanukah together as part of a general holiday season. An objective observer would thus view Pittsburgh's decision to erect a menorah next to the Christmas tree on the steps of the City-County Building not as endorsing Judaism, but merely as recognizing another dimension of the holiday season.

Id. As the testimony of Howard Elbling makes clear, many people are offended "by the fact that people are trying to equate Christmas and Chanukah. The holidays have nothing to do with each other . . ." (J.A. 128).

Moreover, it is difficult to imagine that a rule of law determining the kinds of municipally displayed religious symbols which are permissible under the United States Constitution should turn on the happenstance that the holiday associated with the symbol falls within the month of December. Indeed, such a test would necessitate a decision that no other religion's symbols could permissibly be displayed, since, as far as we know, no other religious holidays fall in that month.[23]

Indeed, the premise of *Lynch*, that the status of Christmas as a national holiday sanctions governmental displays of its overtly religious symbols, is itself fraught with difficulties. In *Lynch*, this

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[23] *Cf.* Chabad Br. at 29 (arguing that no excessive entanglement with religion is required by a decision permitting the display of a menorah as long as the symbols of other non-Christian faiths are also permitted).

Court stated that the City of Pawtucket, in displaying the creche, had simply:

> taken note of a significant historical religious event long celebrated in the Western World. The creche in the display depicts the historical origins of this traditional event long recognized as a National Holiday.

465 U.S. at 680.

> Elsewhere, this Court referred to the creche as a symbol of a particular historic religious event, [ ] part of a celebration acknowledged in the Western World for 20 centuries, and in this country by the people, by the Executive Branch, by the Congress, and the courts for 2 centuries. . . .[24]

Id. at 686.

To millions of American non-Christians, however, a creche does *not* represent a "historical religious event," the celebration of which is a part of all of our religious or national heritage. On the contrary, it represents an event which Christians believe to be historical, but which non-adherents to that faith simply do not accept—*i.e.*, the birth of Jesus as the Son of God.[25] Deeming a representation of such event as historical is akin to making such a claim about a depiction of the parting of the Red Sea. Jews, as well as Christians, may believe that such an event took place, but others almost certainly do not.

Moreover, as Justice Brennan pointed out in his dissent in *Lynch* (joined by Justices Marshall, Blackmun and Stevens):

> When government decides to recognize Christmas Day as a public holiday, it does no more than accommodate the calendar of public activities to the plain fact that many Americans will expect on that day to spend time visiting with their families, attending religious services, and perhaps enjoying some respite from preholiday activities.

465 U.S. at 710.

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[24] *See also* 465 U.S. at 686. (referring to a "host of other forms of taking official note of Christmas, and of our religious heritage").

[25] We agree with the sentiment expressed by Justice Brennan that "for those who do not share these beliefs, the symbolic reenactment of the birth of a divine being who has been miraculously incarnated as a man stands as a dramatic reminder of their differences with Christian faith." *Lynch*, 465 U.S. at 708 (Brennan, J., dissenting).

Not all Americans celebrate Christmas, however. Yet, each December, millions of Americans are made unwilling participants in that event. In public schools around the country, for example, non-Christian children find they often must take part in plays, songs and games that celebrate religious beliefs alien to their own faith, or separate themselves from their classmates and their teachers by refusing to share in the festivities. "To be so excluded on religious grounds by one's elected government is an insult and an injury that [should] not be countenanced by the Establishment Clause." 465 U.S. at 709 (Brennan, J., dissenting). This dilemma causes the Court today to find itself in the unusual position of having to consider arguments by varying factions of religious groups concerning the religious significance of the symbol of one of their holidays.[26]

The solution to this problem, and to the criticism of the view taken by the four circuit courts of appeal to have considered these issues since *Lynch*, and advanced by the respondents and *amici* herein—that this Court must consider each case individually and, with respect to the instant one, distinguish it from *Lynch*—is, we respectfully submit, that the Court reexamine the *Lynch* decision in light of these difficulties and set it aside. For , as stated by Justice Jackson concurring in *McCollum* v. *Board of Education*, 333 U.S. at 238, "[i]f with no surer legal guidance [than its own presuppositions the Court is] to take up and decide every variation of this controversy . . . [the Court] is likely to have much business of the sort."

If, however, *amici* (and the substantial majority of the courts of appeal that have been called upon to interpret *Lynch*) have misinterpreted this Court's message therein, and if, rather than a case-specific analysis, a far broader permission for state utiliza-

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[26] Many Christians, for example, strongly object to denuding Christmas—one of the holiest days of the Christian calendar—of its religious significance. Christmas, after all, celebrates the birth of Jesus, whom Christians regard as the Son of God, and the holiday is to be regarded as far more than simply the basis for the busiest retail season of the year.

Similarly, many Jews would strongly object to the secularization of the menorah, a religious symbol, which is Chabad's position in this case. That position, however, was entirely compelled by this Court's decision in *Lynch*, *i.e.*, Chabad apparently felt no alternative, given that decision, other than to attempt to "secularize" its own holiday and that holiday's religious symbol.

tion of religious symbols and themes was intended, *amici* respectfully submit that *Lynch* is fraught with danger.

As discussed above, *Lynch* may, to our mind, be confined, first, to the Christmas season, and, second, to the specific context in which any religious symbols used are found within a holiday display. *See, supra,* at 8-14. Read broadly, though, *Lynch* could be said to justify the government's display and use of any religious symbol (perhaps even a crucifix, at least if adorned by secular trappings) so long as that use falls within the context of a particular holiday season, Easter for example, where the crucifix could be accompanied by Easter bunnies, egg hunts, parades and the like.[27] Such a view of *Lynch*, we submit, would clearly be at variance with this Court's Establishment Clause jurisprudence—but also illustrates the difficulties presented by *Lynch*.

Prior to *Lynch*, this Court had, time and time again, recognized that religion plays an important role in American history, as well as in current society, and acknowledge that the principle of separation of church and state cannot mean that there is no relation between the institutions of each. *See Bowen* v. *Kendrick*, ___ U.S.___, 108 S.Ct. 2562 (1988) (allowing religious organizations to participate in state-funded counselling programs); *Zorach* v. *Clauson*, 343 U.S. 306 (allowing public school students to be released from school for religious instruction). However, until *Lynch*, the mixture of public and religious functioning was, in essence, non-denominational. Nor, in *Zorach*, did this Court say that students of only one particular religion could be released from school for special instruction; rather, the decision was "re-

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[27] In *ACLU* v. *City of St. Charles*, the Seventh Circuit Court of Appeals, in post-*Lynch* decision, while enjoining the display of a Latin cross on a government building during the Christmas season, did so because the cross was not a traditional part of Christmas symbology. 794 F.2d at 271-72. The cross and, more specifically, the crucifix are, however, intimately associated with Easter observances.

ligion-neutral."[28] *See generally Abington* v. *Schempp*, 374 U.S. at 303-04 (Brennan, J., concurring) (references to some "generic" God may be acceptable because, over time, they have lost their religious significance). In *Lynch*, however, this Court sanctioned government use of a distinctly sectarian symbol, the creche. This use of a sacred symbol, with, at the very least, government authorization, if not whole-hearted endorsement, strikes a blow at the heart of First Amendment protections. That some may believe that a member of one religion (particularly a minority one), or, for that matter, an atheist,[29] may feel only slightly diminished by government sanction of the use of another religion's symbols (particularly that of a majority one) is no justification for that result. This Court has never deviated from the principle that:

> it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all to soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on

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[28] Similarly, that particular religious events and themes surface in public school history and literature classes is by no means inappropriate, so long as they are scussed in a secular context. *See Edwards* v. *Aguillard*, 482 U.S. at __, 107 S Ct. at 2590 (Powell, J., concurring) ("In fact, since religion permeates our history, a familiarity with the nature of religious beliefs is necessary to understand many historical as well as contemporary events.... The Establishment Clause is properly understood to prohibit the use of the Bible and other religious documents in public school education only when the purpose of the use is to advance a particular religious belief.")

[29] Although at times forgotten, this Court recently reaffirmed the principle that government should not only not prefer one religious sect over another, but that it should not foster belief in religion over non-belief:

> Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism. But when the underlying principle has been examined in the cubicle of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.

Wallace v. *Jaffree*, 472 U.S. at 52-53 (footnotes omitted).

> our liberties.' Memorial and Remonstrance Against Religious Assessments, quoted in Everson, *supra*, 330 U.S., at 65,67 S.Ct., at 536, 91 L. Ed. 711.

Abington v. *Schempp*, 374 U.S. at 225. *Cf. Wallace* v. *Jaffree*, 472 U.S. at 60-61 ("The importance of that principle [no official preference for any religious denomination] does not permit us to treat this as an inconsequential case involving nothing more than a few words of symbolic speech on behalf of the political majority. For whenever the State itself speaks on a religious subject, one of the questions that we must ask is whether the government intends to convey a message of endorsement or disapproval of religion").

Nor is it significant that the symbols used or contemplated herein—the Christmas creche and, quite possibly, the Easter crucifix—are "passive." (*See* argument of City, City Br. at 21). This Court has never indicated that, to find an Establishment Clause violation, some showing of direct governmental compulsion, or the requiring of some affirmative act, is necessary. In fact, in *Wallace* v. *Jaffree*, *supra*, a post-*Lynch* decision, this Court acknowledged with approval its prior sentiment that " '[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.' " 472 U.S. at 60 n.51, *citing with approval*, *Engel* v. *Vitale*, 370 U.S. 421, 431 (1962). Particularly where, as here, the two religions sought to be represented by the state—Christianity and Judaism—are the more "established" ones in the Pittsburgh community, this Court should be vigilant in protecting the sensibilities and sensitivities of non-believers in the Judeo-Christian tradition or, for that matter, of any religious creed.[30]

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[30] As previously recognized by the Court, "[t]here are persons in every community—often deeply devout—to whom any version of the Judaeo-Christian Bible is offensive." *Abington* v. *Schempp*, 374 U.S. at 283 (Brennan, J., concurring).

CONCLUSION

For all the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

COUNTY OF ALLEGHENY, *et al.*,

Petitioners,

v.

AMERICAN CIVIL LIBERTIES UNION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals For The Third Circuit

BRIEF AMICI CURIAE OF THE AMERICAN JEWISH CONGRESS ON BEHALF OF ITSELF AND THE NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI

The American Jewish Congress ("AJCongress") is a membership organization of American Jews dedicated to the protection of the civil, political, economic and religious rights of Jews and all Americans. A specific concern of AJCongress is the protection of the religious freedoms guaranteed by the First Amendment. Founded in 1918, AJCongress has participated in most of the church-state separation cases decided by this Court over the last forty years. AJCongress' members, together with most American Jews, regard separation of church and state as essential if they are to enjoy full and equal membership in American society. *See generally* G.A. Tobin & S.L. Sassler, *Jewish Perceptions of Anti-Semitism* (1988).

The National Jewish Community Relations Advisory Council ("NJCRAC") is the umbrella planning and coordinating body for the field of Jewish community relations in the United States. It is composed of 113 community member agencies representing all major Jewish communities in the United States and the following national agencies: B'nai B'rith, American Jewish Congress, Hadassah, Jewish Labor Committee, Jewish War Veterans of the U.S.A., National Council of Jewish Women, Union of American Hebrew Congregations, United Synagogues of America, National Women's League for Conservative Judaism, and Women's American ORT. The community member agencies are listed in the Appendix. The Jewish community, through the actions of NJCRAC's member agencies, has long sought to insure the protections afforded by the First Amendment to the Bill of Rights, particularly the separation of church and state. NJCRAC's commitment to the separation principle serves to help maintain the rights of individuals and groups, minorities and majorities, as political equals in this society.

AJCongress and NJCRAC submit this amicus brief because they believe that the display of major symbols of the Jewish and Christian religions at buildings that symbolize government brings together church and state in an unconstitutional manner. Because the displays at issue here occur during the December holiday season, this case requires the Court to revisit its decision in *Lynch v. Donnelly*, 465 U.S. 668 (1984). AJCongress and NJCRAC urged a different result in that case; and they continue to believe that *Lynch* represents an incorrect application of the Establishment Clause. However, even if this Court continues to adhere to *Lynch*, the decision in this case should nonetheless be affirmed because the displays of the Creche and Menorah at seats of government are substantially different from the seasonal display in *Lynch*. Accordingly, AJCongress and NJCRAC respectfully submit this amicus brief to urge affirmance of the decision of the United States Court of Appeals for the Third Circuit.

SUMMARY OF ARGUMENT

Symbols can be more powerful than words in conveying ideas. The First Amendment's protection for religious freedom is symbolized by a "wall of separation between church and state."[1] The phrase "you can't fight City Hall" has meaning because City Hall is a symbol of government and the power of the state. Religions use symbols to make comprehensible beliefs and concepts that are frequently inexplicable. Thus, the Nativity Creche symbolizes to people of all creeds the Christian belief that Jesus is the incarnation of God in human form. Similarly, the Menorah is a symbol of the Jewish belief in the miracles associated with the Maccabees' recapture of the Temple in Jerusalem.

In the case before the Court, the Third Circuit ruled that the preservation of the wall between church and state precluded the unadorned display of the Nativity Creche and the Menorah in City Hall. Agreeing with earlier decisions of the Sixth and Seventh Circuits, the Third Circuit properly rejected the argument that this Court's decision in *Lynch v. Donnelly*, 465 U.S. 668 (1984), permits any and all government displays of religious symbols in December. Instead, reflecting the teachings of scientists and theologians on the meaning of symbols, the lower court looked to five contextual factors in addition to the holiday season to determine the constitutionality of the public displays of the Creche and Menorah in Pittsburgh, Pennsylvania.

The factors considered by the court of appeals provide a framework for determining whether a particular government display of a religious symbol, when considered in its full context, has the direct and immediate effect of advancing religion in violation of the Establishment Clause. This Court should endorse that analysis and affirm the judgment below.

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1. *See Reynolds v. United States*, 98 U.S. 145, 164 (1879), *quoting* Reply from Thomas Jefferson to an address by a committee of the Danbury Baptist Association (January 1, 1802).

ARGUMENT

Seasonal displays of religious symbols continue to generate litigation and bitter controversy. Far from quieting disputes over such displays, this Court's decision in *Lynch v. Donnelly*, 465 U.S. 668 (1984), has fueled them. In the five years since *Lynch* was decided, challenges to seasonal religious displays have become increasingly common.[2]

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2. There have been more than 20 such cases, apart from the one currently before the Court. The following cases involve the display of the Creche: *American Jewish Congress v. City of Chicago*, 827 F.2d 120 (7th Cir. 1987); *ACLU v. City of Birmingham*, 791 F.2d 1561 (6th Cir.), *cert. denied*, 479 U.S. 939 (1986); *McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984), *aff'd by an equally divided Court sub nom. Board of Trustees of Village of Scarsdale v. McCreary*, , 471 U.S. 83 (1985); *Doe v. City of Warren*, C/A 87-30084 (E.D. Mich. 1988); *Grutzmacher v. Public Building Comm'n*, 87-C-10746, 1988 U.S. Dist. Lexis 13853 (N.D. Ill. 1988); *Mather v. Village of Mundelein*, 87-C-10671, 1988 U.S. Dist. Lexis 12918 (N.D. Ill. 1988); *Smith v. Lindstrom*, C/A 87-0068C, 1988 U.S. Dist. Lexis 12547 (W.D.Va. 1988); *Burelle v. City of Nashua*, 599 F. Supp. 792 (D.N.H. 1984); and *Conrad v. City and County of Denver*, 724 P.2d 1309 (Col. 1986). The following cases involve the display of lighted Crosses during Christmas: *ACLU v. City of St. Charles*, 794 F.2d 265 (7th Cir.), *cert. denied*, 479 U.S. 961 (1986); *ACLU v. Mississippi State General Services Admin.*, 652 F. Supp. 380 (S.D. Miss. 1987); and *Libin v. Town of Greenwich*, 625 F. Supp. 393 (D. Conn. 1985). The following cases involve the display of a Menorah: *Lubavitch of Iowa, Inc. v. Walters*, 808 F.2d 656 (8th Cir. 1986), *after remand*, 684 F. Supp. 610 (S.D. Iowa 1987), *app. pending* (8th Cir 1988); *Chabad Lubavitch of Manasota v. City of Sarasota*, C/A 87-1808 (M.D. Fla. 1987); *Kalamson v. City of Cincinnati*, C/A 1-87-1017 (S.D. Ohio 1987); *Bendich v. City of Seattle*, 84-2-18662-3 (King Co. Super. Ct. 1988); *Wisconsin C.L.U. v. Earl*, 84 Civ. 6853 (Dane County Cir. Ct. 1987), *app. pending*, (Wisc. Sup. Ct. 1988); *Okrand v. Wilkins*, C-57-7-925 (Sup. Ct. L.A. County 1986), *app. pending* (1988); and *Friends of Lubavitch v. Dobby*, C/A 51-04-OP (Sup. Ct. Orange County 1986).

Prior to *Lynch*, there are only four reported challenges to seasonal displays spread over a period of twenty-five years: *Fox v. City of Los Angeles*, 22 Cal. 3d 792, 150 Cal. Rptr. 867, 587 P.2d 663 (1978); *Citizens Concerned for Separation of Church and State v. City and County of Denver*, 526 F. Supp. 1310 (D. Col. 1981), and *Citizens Concerned for Separation of Church and State v. City and County of Denver*, 481 F. Supp. 522 (D. Col. 1979), *app. dismissed*, 628 F.2d 1289 (10th Cir. 1980), *cert. denied*, 452 U.S. 963 (1981); *Baer v. Kolmorgen*, 14 Misc. 2d 1015, 181 N.Y.S.2d 230 (Sup. Ct. Westchester County 1958); and *Laurence v. Buchmueller*, 40 Misc. 2d 300, 243 N.Y.S.2d 87 (Sup Ct. 1963).

While *Lynch* might have been expected (and was perhaps intended) to quiet such controversies, the continued litigation is explicable only by, and indeed itself evidences, the heightened social and religious significance of seasonal religious displays.[3] Much, but not all, of the Jewish community regards *Lynch* as a slap in the face since the Creche, like the Crucifix, symbolizes the fundamental ideas which separate Judaism and Christianity. *See, e.g.*, Redlich, *Nativity Ruling Insults Jews*, N.Y. Times (March 26, 1984); Mann, *Religious Symbols In Public Places*, 52 Cong. Monthly (No. 3) 3 (1985). Simultaneously, however, the decision has provoked a bitter dispute within the Jewish community about the desirability of erecting a Chanukah Menorah in tandem with official Christmas displays.[4]

The post-*Lynch* proliferation of cases is particularly remarkable in light of the suggestion in *Lynch* that such cases trivialized the Establishment Clause. *See* 465 U.S. at 687.

3. By contrast, there is rarely litigation over the notational government "acknowledgement[s] of our religious heritage" identified in *Lynch*, 465 U.S. at 675-77. The attenuated religious significance of those acknowledgments makes them constitutionally tolerable. Most have never been challenged and those that have been were typically attacked only once by an individual. *See Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970) (In God We Trust); *Zwerling v. Reagan*, 576 F. Supp. 1373 (C.D. Cal. 1983) (Year of the Bible); *O'Hair v. Blumenthal*, 462 F. Supp. 19 (W.D. Tex. 1978), *aff'd*, 588 F.2d 1144 (5th Cir.), *cert. denied*, 442 U.S. 930 (1979) (In God We Trust). Organizations committed to separating church and state do not commit energy and resources, let alone credibility, to such efforts, as they have to challenging official Creches, Menorahs and other religious symbols.

4. *Compare* Stern, *The Year of the Menorah* (AJCongress 1987) *with Let There Be Light: Thirty Days In the Lives of Chabad Lubavitch Lamplighters* (1986) [hereinafter *Let There Be Light*]. Parts of the latter are reproduced in Joint Exhibit Volume at 17.

Hereafter references to the Joint Exhibit Volume are cited as "JEV" and to the Joint Appendix as "JA." The Brief of the County of Allegheny is referred to as "County Brief," the Brief of the City of Pittsburgh as "City Brief," that of Chabad as "Chabad Brief," and that of the United States as "U.S. Brief." The opinions of the district court and court of appeals below are reproduced in the appendices to the petitions for certiorari; references to those opinions will be to their reproduction in the Appendix to the Petition in No. 88-90, hereafter cited as "Pet. App."

The display of the Menorah at Pittsburgh's City-County Building raises this internecine dispute to one of constitutional dimension. At the same time the display at the Allegheny County Courthouse again brings before the Court the propriety of the seasonal display of the nativity scene; this time, however, the Creche is on the premises of the symbol of government. These displays of the Creche and the Menorah at the seat of government, albeit "in the context of the holiday season," are different in kind and degree from *Lynch*'s seasonal display celebrating an increasingly secular Christmas. Accordingly, the lower court's finding of a violation of the Establishment Clause should be affirmed.

I. THE CONSTITUTIONALITY OF DISPLAYS OF RELIGIOUS SYMBOLS AT BUILDINGS THAT SYMBOLIZE GOVERNMENT SHOULD BE CONSIDERED IN THE CONTEXT OF THE SIGNIFICANCE OF SYMBOLISM IN THEOLOGY AND POLITICS.

Symbols communicate. *Spence v. Washington*, 418 U.S. 405, 410 (1974).

> Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones.

West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943).

Symbols communicate more comprehensively, encompassing far more levels of meanings, than the printed or spoken

word.[5] At the same time, they communicate in ways far less intellectually precise, far less controlled, far less contained, than words in a book or on a disclaimer sign. Moreover, symbols are apprehended differently from the printed word, being perceived as a whole at once.[6]

A symbol has no objective, fixed meaning, set for all times, all places and all persons. "What we see . . . depends on our interpretation . . . . [T]here is no innocent eye; seeing is an active process, not a passive one." 7 The Encyclopedia of Religion, *Ichnography: Approaches to Ichnography and Iconology* 5 (1987) (citing work of L. Wittgenstein). As Justice O'Connor recognized in *Lynch*, 465 U.S. at 690, a symbol may have different meanings for different people; believers will see a religious symbol one way, non-believers another, and persons searching for a faith that will carry them through the crisis of the moment will see the symbol in yet another way.

Perhaps the most powerful symbols are religious symbols for they enable man to reduce to human scale the inexplicable faith that constitutes religion.[7] Students of religious symbolism emphasize that symbols are an effective, perhaps indispensable, device for communicating complex religious ideas.[8]

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5. F.N. Dillstone, *The Power of Symbols in Religion and Culture* 7-14 (1986) [hereafter Dillstone, *Power of Symbols*]; P. J. Tillich, *Theology and Symbolism*, Religious Symbolism 108-09 (1970) [hereafter Tillich, *Theology and Symbolism*].

6. "Visual forms are not discursive: they do not represent their message sequentially but simultaneously. While the meanings given through verbal language are understood successively, those given through visual forms are understood only by perceiving the whole at once." 7 The Encyclopedia of Religion, *Ichnography: Words and Images* 1-3a (1987). Susanne Langer, who argues for such a distinction in her *Philosophy in a New Key* 79-102 (1951), calls this kind of semantics "'presentational symbolism,' indicating that we grasp it not by reasoning but by feeling."

7. Dillstone, *Power of Symbols*, *supra* note 5, at 2-15, 99-147; C.C. Richardson, *The Foundations of Christian Symbolism*, Religious Symbolism 1 (1970); Tillich, *Theology and Symbolism*, *supra* note 5, at 107-16.

8. Religious symbols do not merely portray some historical event, but rather communicate to the believer the message that the depicted historical event involved some divine intervention: "The symbol reveals certain dimensions of reality that would otherwise elude our knowing." 14 The Encyclopedia

Because a symbol engages the onlooker's attention subtly and indirectly, it is effective in situations where words, especially words which are intended to proselytize, are not.[9] It is ideally suited for communicating religious ideas in a religiously diverse and increasingly secular society, in which open calls to convert are impolite and in which discussion with strangers of topics as sensitive as religion is scrupulously avoided.

The use of symbols is not confined to religion. The nation's political life is rich with symbols. The Statue of Liberty, the bald eagle, the presidential monuments, the flag, the black robes of the Justices of this Court, the uniforms of the Armed Forces, all have symbolic meanings. They are the physical symbols of the American civil religion. Bellah, *Civil Religion In America*, 96 Daedalus 1 (Winter 1967). Buildings like the National Capitol, a statehouse or city hall are not only functional but also symbolic of the openness of democratic government and its responsibility to all citizens.

As this Court recognized in *Spence*, 418 U.S. at 410, symbols take on meaning from the context in which they are displayed because that context is part of the "whole" symbol.[10] "People's responses to a symbol will be contingent upon their assessments of the circumstances of its usages." C. Elder & R. Cobb, *The Political Uses of Symbols* 57 (1983). A triptych depicting the Nativity of Christ has one meaning on the altar of

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NOTES *(Continued)*

of Religion, *Symbolism* 206 (1987). For Paul Tillich, the noted theologian, "the object of theology is found in the symbols of religious experience. Theology, then, is the conceptual interpretation, explanation, and criticism of the symbols in which a special encounter between God and man has found expression." Tillich, *Theology and Symbolism*, *supra* note 5, at 108. Similarly, while Abraham Joshua Heschel explained that in Judaism symbols are not treated as surrogates for the divinity, he recognized that symbols are an important device for communicating religious ideas and values. *See* A. J. Heschel, *Symbolism and Jewish Faith*, Religious Symbolism 53 (1970).

9. *See* Dillstone, *Power of Symbols*, *supra* note 5, at 145 ("Initially, every human is immersed in the profane world, but symbolism effects a permanent solidarity between man and the sacred") (quoting Mircea Eliade).

10. Dillstone, *Power of Symbols*, *supra* note 5, at 36-41.

a church, a different one when hung on a museum wall, and still another meaning when displayed in the lobby of the county courthouse.

It is against these teachings about the significance of symbols that courts must decide cases such as this one. The court below properly applied this learning to determine that the melding of religious and civil symbols at issue here violated the Establishment Clause through a "temporal commingling of the sacred and civil." Van Alstyne, *What Is An "Establishment of Religion,"* 65 N.C.L. Rev. 910, 914 (1987).

II. *LYNCH* DID NOT ESTABLISH A BROAD RULE PERMITTING ANY AND ALL GOVERNMENT DISPLAYS OF RELIGIOUS SYMBOLS IN DECEMBER.

Citing *Lynch*, petitioners argue that when the constitutionality of seasonal displays of religious symbols is considered, contextual factors other than the holiday season ought to be ignored. County Brief at 19-21; City Brief at 17; Chabad Brief at 9-14. They urge a black-letter rule permitting December displays, without regard to their location, content, or purpose. They argue that the Second Circuit was correct in holding that the only relevant context against which to measure December religious displays is the holiday season. *McCreary v. Stone*, 739 F.2d 716, 728-29 (2d Cir. 1984), *aff'd by an equally divided Court sub nom. Board of Trustees of Village of Scarsdale v. McCreary*, 471 U.S. 83 (1985).

However, as the Third, Sixth and Seventh Circuits have concluded,[11] *Lynch* established no such rule limiting the courts' analysis of religious displays to a single contextual factor, the Christmas holiday season. The problem of whether and what additional contextual factors should be considered arises from

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11. In addition to the decision below, *see American Jewish Congress v. City of Chicago*, 827 F.2d 120 (7th Cir. 1987); *ACLU v. City of Birmingham*, 791 F.2d 1561 (6th Cir.), *cert. denied*, 479 U.S. 939 (1986); *see also Burelle v. City of Nashua*, 599 F. Supp. 792 (D.N.H. 1984).

the ambiguity of Chief Justice Burger's opinion in *Lynch*.[12] However, Justice O'Connor's concurrence, which she characterizes as not stating any major differences with Chief Justice Burger's opinion, 465 U.S. at 687, repeatedly indicates that religious symbols must be judged not only in the holiday context, but also on other relevant factors, including, in that case, the "particular physical setting" and the presence of surrounding secular symbols, such as reindeer, gifts, mistletoe and the like. *Id*. at 692. Thus, Justice O'Connor refused to confine the analysis to the holiday context to the exclusion of other factors.[13]

This approach is the appropriate frame of reference if the Establishment Clause is not to take a December vacation. To hold otherwise is to countenance *de jure* discrimination against faiths which celebrate no holidays in December[14] and whose symbols, if displayed at all, will be permitted only at the Christmas season when they are culturally and religiously irrelevant and hence of only secondary significance. If, for

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12. Justice Berger seems to base his opinion on the fact that the *Lynch* Creche was part of a large seasonal display. *See* 465 U.S. at 671 (description of Creche as part of larger display); *id*. at 682 (discussion of "inclusion of the Creche" in the Christmas display); *id*. at 686 ("if inclusion of [the Creche] . . . would so 'taint' the city's exhibit"). Yet, he also seems to base his opinion on the fact that the Creche was displayed during the Christmas holiday season. *See id*. at 679 ("In this case, the focus of our inquiry must be on the Creche in the context of the Christmas season"); *id*. at 680 ("When viewed in the proper context of the Christmas Holiday season . . .").

13. Justice O'Connor's opinion is replete with indications that a determination of the constitutionality of a display of a religious symbol must take into consideration the display's unique characteristics. *See, e.g.*, 465 U.S. at 694 ("every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement of religion"); *id*. ("I cannot say that the particular creche at issue in this case . . ."). Moreover, the opinion emphasizes that such a determination must consider a host of factors in addition to the holiday season. *See, e.g., id*. at 691 (discussing the "evident purpose of including the creche in the larger display . . ."); *id*. at 692 ("the creche . . . is very commonly displayed along with secular symbols, as it was in Pawtucket"); *id*. ("These features combine to make the government's display of the creche in this particular physical setting . . . .").

14. *Cf. Larson v. Valente*, 456 U.S. 228 (1982).

example, a Buddhist display is included in a Christmas exhibit, when there is no relevant Buddhist holiday being celebrated, the inevitable message is that "Christmas is the 'official' holiday" and that other religions are stepchildren.

The decision in *Doe v. City of Warren*, C/A 87-30084 (E.D. Mich. Oct. 20, 1988), cited by the County (County Brief at 17), which emphasizes the holiday season to the exclusion of all else, illustrates the point perfectly. Although plaintiffs there challenged both a Creche and a Menorah, the court dealt only with the Creche, nowhere discussing the legality of the Menorah, which was simply swept along by the Christmas display.

Similarly, the dissenting judge below, who, in evaluating the constitutionality of the Creche, would read *Lynch* as considering only the seasonal context,[15] was himself forced to rely on other contextual factors to permit the display of the Chanukah Menorah, since the religious and cultural integrity of that symbol could not be maintained if its display were justified by reference to a holiday of an antithetical religious tradition. 842 F.2d at 670-71 (Pet. App. at 32a).

In short, unlike the approach of petitioners, who would permit any and all religious displays in December, the broad contextual analysis adopted by the court below (as well as by the Sixth and Seventh Circuits)[16] is consistent with *Lynch* and is faithful to the most basic precept of the Establishment Clause — that of equality between faiths. *Larson v. Valente*, 456 U.S. 228, 244 (1982). In so doing it implicitly acknowledges the teachings of semiotics by which government displays of symbols must be judged.

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15. The Christmas season can mean a period beginning only days before Christmas, right after Thanksgiving, or with the first Sunday in Advent, and continuing at least until after New Year's Day, and perhaps until Candlemas, on February 2, the end of the church's Christmas cycle. 4 New Catholic Encyclopedia, *Christmas and Its Cycle* 655 (1967). Chanukah sometimes, but not always (as this year), overlaps Christmas.

16. See cases cited in note 11, *supra*.

III. THE THIRD CIRCUIT'S ANALYSIS, WHICH FOCUSES ON A BROAD RANGE OF CONTEXTUAL FACTORS, AIDS A COURT IN DISCERNING THE CONSTITUTIONALITY OF GOVERNMENT DISPLAYS OF RELIGIOUS SYMBOLS.

No general rule can determine in advance whether the religious import of a particular symbol is overshadowed by the surrounding secular context, or whether the reverse is true. As in other church-state contexts, only case-by-case adjudication permits a court to locate the line between permissible and impermissible government involvement with religion. *Cf. Bowen v. Kendrick*, 108 S. Ct. 2562 (1988).

The courts which have read *Lynch* as considering contextual factors beyond the holiday season have looked to a broad range of factors. The inquiry is summarized in the Third Circuit's enumeration, 842 F.2d at 662 (Pet. App. at 13a-14a):

> The variables that a court should consider . . . include: (1) the location of the display; (2) whether the display is part of a larger configuration including nonreligious items; (3) the religious intensity of the display; (4) whether the display is shown in connection with a general secular holiday; (5) the degree of public participation in the ownership and maintenance of the display; and (6) the existence of disclaimers of public sponsorship of the display.

These factors, which were intended as an explication of the effects branch of the three-part test enunciated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), accurately capture the teachings of social scientists and theologians on the perception and meaning of symbols. The listing provides a useful framework for determining whether a particular symbol has the direct and immediate effect of advancing religion[17] or, to use Justice

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17. *See Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 783 n.39 (1973); *cf. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 107 S. Ct. 2862, 2868 (1987), quoting *Lemon v. Kurtzman*, *supra*, 403 U.S. at 612 ("a principal or primary effect").

O'Connor's reformulation, whether a particular display in fact "conveys a message of endorsement or disapproval" of religion.[18]

The criteria identified by the Third Circuit are sufficiently inclusive and balanced to allow for fair and comprehensive evaluation of the public significance of the particular religious symbols. The lower court's analysis is not an end-run around *Lynch*, as petitioners charge (County Brief at 10-13; City Brief at 8-11; Chabad Brief at 8), but rather a framework for case-by-case adjudication of the propriety of religious displays by government. As the following application of the Third Circuit's analysis to the displays at issue here illustrates, the court below was on solid ground in conducting its inquiry.

1. The Location of the Creche and Menorah at the Seat of Government Conveys Governmental Approval of the Religions Whose Symbols Are Displayed.

Religious symbols displayed at the seat of government manifest a joining of civil and religious meanings. The Creche and the Menorah (referring in particular to the human incarnation of the Son of God sent to earth to redeem mankind in the case of the Creche (JA 72-73; 84) and the divine miracle associated with the cleansing of the Temple after the Maccabeean victory over the Syrian Greeks in the case of the Menorah (JA 262-64)) convey the theologically crucial messages that God intervenes in history and that God is concerned with those who trust in Him. The civic symbol, the seat of government, epitomizes democratic rule. The blending of one with the others embodies the constitutionally suspect suggestion that religion in general, and the Jewish and Christian religions in particular, are relevant to the exercise of civil power. *Grand Rapids School Dist. v. Ball*, 473 U.S. 373 (1985); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982); *cf. Burton v. Wilmington Area Parking*

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18. *Lynch*, 465 U.S. at 690; *see also Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 389 (1985).

Authority, 365 U.S. 715 (1961) (racially discriminatory restaurant on local public premises suggests unconstitutional state approval of discrimination).

However, the location of these displays is improper for yet another reason. By giving a preferred place to symbols of one or two faiths, the government unambiguously, if unintentionally, announces that those faiths enjoy a preferred status in society. To be sure, the United States is not an exclusively "Christian nation"[19] in either a demographic or a legal sense. The Establishment Clause, however, does not exhaust itself in preventing an exclusive religious monopoly. *Wallace v. Jaffree*, 472 U.S. 38, 52 (1985).[20]

Even if the Menorah and Creche are taken as one (despite the fact that they adorn different buildings owned and operated by two distinct political entities, are not part of a single physically unified display and are not visible simultaneously), they represent only the Judeo-Christian tradition, not other faiths, agnosticism or atheism, which are all part of contemporary American life. It is surely not sufficient to argue, as Chabad does (Chabad Brief at 22), that a Judeo-Christian display is better than a purely Christian one and that the adverse impact on others of having only Judeo-Christian symbols displayed can be dismissed because no other group has made an issue of the unfairness. Government is affirmatively charged with not treating any religious position unfairly; that obligation is not conditional on a request for better treatment from an affected group. To be sure, neither the Creche nor the Menorah physically obstructs entrance to the Courthouse or City Hall;[21] but the display of selected religious symbols at the seat of government

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19. *See Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892).

20. *See* M. Silk, *Spiritual Politics: Religion and America Since W.W. II* (1988).

21. The United States repeatedly emphasizes the absence of coercion as a reason to uphold the constitutionality of these displays. (U.S. Brief at 21-22). This Court, however, long ago rejected coercion as an element of an Establishment Clause claim. *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 222-23, 224 n.9 (1963).

necessarily communicates that non Judeo-Christian belief systems do not share the same status in the eyes of government.[22]

The decision to locate the symbols at the seat of government is surely not happenstance. *See, e.g.*, JA 78 (Father Gregory Swiderski); JA 271 (Rabbi Israel Rosenfeld). Their sponsors consciously chose to have their religious symbols displayed at government office buildings, not at a church, synagogue, or business, where such symbols can be and are properly displayed without legal controversy.[23] The displays in this case, however, are not public in the sense of being prominent, but public in the sense of being official displays on government property. The distinction is crucial.

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22. Moreover, while there is no evidence that the displays here were motivated by a governmental desire to obtain a political advantage, there is a risk that if all December displays are allowed, some governmental entities may seek to use religious symbols at their doorstep as a tangible indication that they enjoy the blessings of institutional religion and, by extension, God. The First Amendment denies government the right to such exploitation of religion. *Cf.* J. Madison, *Memorial and Remonstrance Against Religious Assessments* ¶5, reproduced as Appendix to *Everson v. Board of Educ.*, 330 U.S. 1, 63 (1947), which warned against "the Civil Magistrate . . . employ[ing] religion as an engine of civil policy." As Professor Van Alstyne has written, "it is an act of civil hubris for government to seek religious purchase on civil loyalty," by confusing "the consensual and the democratic with the divine." Van Alstyne, *What Is "An Establishment of Religion,"* 65 N.C.L. Rev. 910, 914 (1987). Unlike the December season analysis urged by petitioners, the multi-factored analysis adopted by the Third Circuit would allow consideration of such motivation.

23. Nothing in the Constitution confines religion to the home or to citizens' private lives. Any effort to exclude religion from the marketplace of ideas would be unconstitutional. *McDaniel v. Paty*, 435 U.S. 618 (1978); *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 670 (1970); *Widmar v. Vincent*, 454 U.S. 263 (1981). Moreover, where a group has access to a public forum for purposes of a meeting, demonstration or worship service, it may properly display its religious symbols in conjunction with those activities. *O'Hair v. Andrus*, 613 F.2d 931 (D.C. Cir. 1979). This case involves no such usage, but rather free-standing, semi-permanent, displays intended to benefit from an aura of government approval.

2. The Absence of Surrounding Secular Symbols Highlights the Religious Message of the Creche and Menorah.

The Court in *Lynch* reasoned that because the Pawtucket Creche was included in a larger secular holiday display consisting, *inter alia*, of candy-striped poles, clowns, elephants, teddy-bears, colored lights and other secular Christmas symbols, its presence served principally to recall the "religious origin of the Christmas celebration." 465 U.S. at 685. Thus, the *Lynch* Creche, in a commercial surrounding, did not convey an independent religious message.

Conversely, and by the same reasoning, the absence of parallel secular symbols, describing the holiday in secular terms, allows a religious symbol to speak with an unambiguously religious voice. When a religious symbol appears in isolation with no surrounding secular symbols to indicate that it is any less religious than an identical symbol displayed in similar fashion at a church, synagogue, mosque or temple, its religious message is undeniable and undiluted.

Although often lampooned,[24] the so called two-reindeer interpretation of *Lynch* is sensible and squarely rooted in Establishment Clause principles. The absence of surrounding secular[25] symbols in the Pennsylvania displays strengthens the inference which the Third Circuit drew and which the public surely is entitled, and likely, to draw: that this Creche and this Menorah convey religious messages.

Chabad argues (Chabad Brief at 26-27) that the Menorah is viewed together with the nearby Christmas tree as a single symbol, and that no one can mistake that hybrid symbol as a

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24. *American Jewish Congress* v. *City of Chicago*, *supra*, 827 F.2d at 131 (Easterbrook, J., dissenting), citing Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall — A Comment on Lynch* v. *Donnelly*, 1984 Duke L.J. 770, 785.

25. Poinsettias were planted near the Creche. However, the introduction of the poinsettias as a Christmas flower was premised on a religious tale of a poor Mexican boy who came to pay his respects to the Infant Jesus in a Creche. Having nothing to bring with him as a present, he plucked a flower (which turned red) and laid it in the Creche. J.W. Golby & A.W. Purdue, *The Making of the Modern Christmas* 104 (1986).

government endorsement of either religion. Although Chabad is correct that context matters, the juxtaposition of the Christmas tree and the Menorah is not sufficient to permit display of the Menorah. When a Creche is surrounded by secular symbols of the same holiday, the entire display suggests that this is a holiday with secular and religious elements. When symbols of divergent faiths, celebrating different ideas,[26] are displayed together, the informed viewer does not put them together in this fashion; rather, the mind naturally separates the two and assumes the government is celebrating each of the Judeo-Christian holidays which occur in December.[27]

3. The Symbols' Religious Message is Confirmed by their Sponsors' Religious Motivation.

The Third Circuit suggested that questions of ownership and public involvement are also relevant to the assessment of a symbol's impact. Here the Creche and Menorah are property of the County and City, having been "donated" by religious groups.[28] (JA 164, 290-91). At the same time, however, the City and County have only ministerial duties in erecting the challenged displays, a fact which to some small degree supports

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26. *See, e.g.*, Rabbi W. Jacob, *Contemporary American Reform Response* 260 (1987).

27. Chabad, moreover, is not interested in the general (Christian) viewer, but the Jewish viewer, and particularly the Jewish viewer who is susceptible of being "drawn back to his Jewish roots." For many American Jews, Americanization meant abandoning or suppressing Jewish roots, as a condition of Americanization. *See, e.g.*, M.E. Marty, *Pilgrims in Their Own Land: 500 Years of Religion in America* 285-94 (1984); S.E. Alstrom, *A Religious History of the American People* 970-84 (1972). The state's identification with Judaism, as represented by its sponsorship of the Menorah (regardless of the presence of the tree) overcomes this (perceived) dilemma, and thus substantially aids the likelihood of Chabad's efforts to encourage increased religious observance.

28. Indeed, in response to Chabad's motion for a recall of the mandate, the City asserted that the Menorah was not intervenor's display (as Chabad claimed), but its own. Answer to Motion of Chabad for Recall of Mandate ¶3, *ACLU v. County of Allegheny*, 842 F.2d 655 (3rd Cir. 1988).

petitioners' position. This mitigating factor, however, is outweighed by the public knowledge that those official displays are sponsored by religious groups. Unlike the *Lynch* Creche, whose business association sponsor intended to stimulate commercial activity, 465 U.S. at 671, the Creche and Menorah challenged here were erected by their sponsors with religious goals in view.

a. *The Creche*

The Courthouse Creche was donated by the Holy Name Society, an entity founded in the thirteenth century "to exhort the faithful to increased reverence for the name of the Redeemer, and . . . to make reparation for and to counteract the prevalent profanity and blasphemy," tasks it carries on to this day. New Catholic Encyclopedia, *Holy Name Society* 79 (1967). It promotes "public manifestation of respect for Christ's name . . . [by leading] . . . mammoth rallies, parades, and religious demonstrations of other kinds." *Id*. at 79b; *see also* JA 73-74.

The Society's display of the Creche at Christmas time effectively urges the viewer to "Keep Christ in Christmas"; to contemplate the message displayed on the banner over the Creche, "*Gloria In Excelsis Deo*"; to ignore the prevailing profanation of the Christmas holiday; and to deepen respect for Christ. These are quintessentially religious messages, sent by the "official" Allegheny County Creche. The official display suggests that Christmas is a societal celebration of the birth of the Christian Messiah rather than a private family religious celebration. Its presence at the seat of government thus serves to counter, in an unmistakable way, the contemporary trend towards the privatizing of Christmas. Cheal, The *Private and the Public: The Linkage Role of Religion Revisited*, 28 Rev. Rel. Research (No. 3) 209 (1987).

b. *The Menorah*

Chabad-Lubavitch[29] likewise erects Menorahs to transmit

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29. Chabad-Lubavitch (hereafter Chabad) is one of numerous Hassidic Jewish groups. It bears the name of the town in Russia where it had its beginnings. *See* 7 Encyclopedia Judaica, *Habad* 1014 (1980). Unlike most contemporary Hassid groups, which are inwardly directed, Chabad is actively engaged in seeking out Jews whose religious commitment is weak, or takes

religious messages. While originally the Menorah was lit only in or around the home, it has long been the custom to light a Menorah in the synagogue; the purpose of such celebrations outside the home is to "publicize the miracle" of Chanukah in a public place. *See* 7 Encyclopedia Judaica, *Hanukkah* 1128 (1980); JA 266-72 (testimony of Rabbi Israel Rosenfeld). This goal is achieved by lighting a Menorah at City Hall.

Since 1979, Chabad has instituted a nationwide campaign to erect Chanukah Menorahs on governmental land associated with relevant seats of government. (JA 264-66). Chabad believes that Chanukah Menorahs should be placed in public places, such as on the City-County Building, during the Chanukah celebration to spread to as may people as possible the message of God's miracle for the Jewish people that took place on Chanukah. (JA 236-37, 287-90).

The Lubavitcher Rebbe, spiritual leader of the Chabad movement [JA 249-50, 265], has acknowledged the importance of location to the success of this nationwide campaign:

> [W]here Chanukah Lamps were kindled publicly [t]he results have been most gratifying in terms of spreading the light of the Torah and Mitzvoth, and reaching out to Jews who *could not otherwise* have been reached . . . . It was precisely through kindling of the Chanukah Lamp in public places, during "ordinary" weekdays, with pride, that it was brought home to them that true Judaism is practiced daily, and that no Jew should feel abashed about it.[30]

(emphasis in original); *accord* the letter from the Lubavitcher Rebbe reproduced in *Chanukah: A Lesson in Religious Freedom*

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non-traditional forms, in an effort to generate a commitment to a higher level of Jewish religious observance. *See generally* L. Harris, *Holy Days: The World of a Hassidic Family* 178 (1985).

30. Quoted in Stern, *The Year of the Menorah* 5, *supra* note 4. The Rabbi has also made clear that the purpose of a public Menorah is not to proselytize non-Jews, but to "bring Jews back to their Jewish roots." *Id.* at 8. Chabad's publication, *Let There Be Light*, *supra* note 4, describes the effort to place Menorahs in public places as intended to "spread the light of Torah and mitzvot (commandments) to each and every Jew. . . ." *Id.* at 4.

(JEV 44). This message of encouraging greater personal religious commitment was evident to the district court, which found that the Menorah symbolized the lighting of Jewish souls. (Pet. App. at 39a).[31]

Plainly, those persons and groups who erect religious displays at the seat of government believe that they are effective in furthering their religious missions. The district court's additional finding (Pet. App. at 39a) that the Creche and Menorah were constitutionally tolerable because they enabled the government to inform the public at large that each faith had a miracle to celebrate during the holiday season underscores the correctness of these beliefs.[32]

4. The Challenged Symbols Are Intensely Religious.

The intensity of a symbol's religious message is directly proportional to the extent to which it is reserved for religious purposes, and not used for conflicting ethnic, national or commercial purposes. Some religious principles are more intense, more central to a faith, than others. Both of these factors must play a role in a court's assessment of the impact of a particular symbol.

a. *The Creche*

The *Lynch* Court took for granted that the Creche was a religious symbol. 465 U.S. at 680, 685. That judgment was well

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31. This was not an idiosyncratic view, a judicial rewriting of sacred history. For some scholars, the emphasis on personal spirituality, on the "spirit of God being with his people" is the historic meaning of the Menorah as a religious symbol. V.A. Klagsbold, *The Menorah As A Symbol: Meaning And Origin in Early Jewish Arts*, Jewish Art 126, 130 (1988).

32. As the court of appeals observed, this governmental platform (which, of course, was not available to non-Judeo-Christian faiths) was not an appropriate place from which to broadcast this message. 842 F.2d at 663 (Pet. App. at 15a). Whether a particular event was a miracle, to say nothing of whether miracles occur at all, 9 The Encyclopedia of Religion, *Miracles* 541 (1987), is a quintessential religious question, which the government may not ask, let alone answer. *See United States v. Ballard*, 322 U.S. 78 (1944). Nor may government facilitate efforts by religious groups to proselytize members of the public. *School Dist. of Abington Township v. Schempp*, *supra*, 374 U.S. at 314 (Stewart, dissenting).

founded. The Creche's origins as a public Christmas symbol are without doubt religious. Its use stems in Western Christendom from the Midnight Mass said on Christmas at the Church of Santa Maria Maggiore in Rome, at the shrine of Christ's Creche. The Roman liturgical use of the crib on Christmas night was borrowed from a similar rite of the Church at Jerusalem. In the Middle Ages, in a conscious effort to popularize the religious message of Christmas for those not intimately familiar with the seasonal liturgy, St. Francis of Assisi originated the devotion of the Christmas crib, a devotion which became, and has remained, widely popular.[33]

The motto *"Gloria In Excelsis Deo,"* which appears over the Courthouse Creche, and which underscores the Creche's religious message, is also closely tied to the Christmas liturgy. Like the Creche, it was adopted by the Roman Church for use at Christmas in imitation of the Church at Jerusalem. According to *Luke* 2:14, this prayer was first said by the angels on Christmas eve."[34]

The Creche is not just a mildly or tangentially religious symbol, or one whose present religious significance is an artifact of earlier pagan practices. To the contrary, the Creche epitomizes the fundamental and primary tenant of the conventional Christian faith — that God was incarnate in flesh and blood.[35]

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33. The Encyclopedia of Religion, *Christmas* 460(b) (1987); 5 New Catholic Encyclopedia, *Crib* 447 (1967); 4 New Catholic Encyclopedia, *Christmas and Its Cycle* 659 (1967); C.A. Miles, *Christmas in Ritual and Tradition-Christian and Pagan* 94-95, 115-118 (1912).

34. C.A. Miles, *Christmas in Ritual and Tradition-Christian and Pagan*, 91, 94, 105-118 (1912). The creche reached the United States by way of pietistic German Protestant immigrants, as well as Catholics. E.L. Tennant, *American Christmases* ch. v (1986); J. H. Barnett, *The American Christmas: A Study In National Culture* 11-13 (1954).

35. The Nativity Creche in this case represented the theological account of Jesus' birth. At the top of the Creche was an angel with a banner inscribed with the phrase from the Christian Gospel *Luke* 2:14 *"Gloria in Excelsis Deo,"* meaning "Glory to God in the Highest." (JA 74-75; JEV 4). The infant Jesus lay on a white cloth, which is used as a symbol on the altar during the part of the Catholic Mass in which Christ becomes present in the Eucharist. (JA 76). Moreover, the Creche showed the infant Jesus being worshipped as God by

Thus, it represents one of the major differences between Christians and Jews and other non-Christians.

b. *The Menorah*

The Menorah is the central ritual article for the Jewish holiday of Chanukah. Utilized in the "Mitzvah," or divinely commanded act, of lighting an increasing number of candles on each night of the eight-day Jewish holiday, it is intended to, and does, convey the story of the miracle of God celebrated by Chanukah.

Chanukah, which comes from the Hebrew word for dedication, is the Jewish holiday that marks the rededication of the Jewish Holy Temple after the successful Hasmonean revolt against the Syrian Greeks. The Menorah recalls the miracle that oil sufficient to light the Temple Menorah for one day sufficed for eight. (JEV 44-45; JA 263-64).[36] As the Chanukah liturgy, recited when the Menorah at the City-County Building is lit (JA 271, 273), explains, "these candles which we are lighting [recall] the miracles and wonders, the salvation and the battles which [God] performed for our fathers in those days, at this time." Thus, the Menorah represents the miracle of God's intervention in history on behalf of His faithful celebrated at Chanukah. It is for constitutional purposes, therefore, a religious symbol, even though it may not be a "sacred" object under Jewish law.[37] The

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NOTES *(Continued)*

kings and shepherds alike. (JEV 3). Thus, the Creche depicted in adorational terms the birth of a divinity in the form of an infant.

36. As has been the tradition for at least six or seven hundred years, the Menorah at issue here, although not identical with the Temple Menorah, is loosely styled after it. F. Landsberger, *Old Hanukkah Lamps in Beauty and Holiness: Studies In Jewish Customs and Ceremonial Art* 283-307 (1970); M. Narkiss, *Menorat Ha-Chanukah* (1939).

37. The 7-branched Menorah serves as a symbol of the State of Israel, *see generally* E. Tzoref, *Menorat Yisroel* (1988) (Hebrew) and in a broader sense, the Jewish people. In contexts where its use in connection with the State of Israel is apparent, the Menorah will be a secular symbol. But the 9-branched Menorah erected during Chanukah is not intended to symbolize the State of Israel or the Jewish people generally. Chabad's motivation suggests no such secular purpose. (JEV 17-23, 44-51).

Menorah is in this regard like a Creche which is intended to, and does, convey religious ideas.

5. The Disclaimer Signs Underscored the Symbolic Religious Message.

The court of appeals held that an appropriate disclaimer could somewhat mitigate the religious significance of the displays. Even if true, it does not aid petitioners here. Each of the symbols was accompanied by a sign which made no effort to dispel any suggestion of government endorsement.

On the contrary, the signs reinforce the impression of government endorsement of each symbol's religious message. The sign accompanying the Creche simply announced that the Creche was donated to the County by the Holy Name Society. (JA 290-91). Far from disclaiming state endorsement, that sign proclaims the Creche to be a project of government. Similarly, the sign accompanying the Menorah describes it as the City's display.[38] Unlike the sign at issue in *McCreary v. Stone*, *supra*,[39] these signs proudly proclaim government involvement.[40] They, consistent with every other element of the displays, bespeak an official endorsement of religion.

In summary, the five factors considered by the court of appeals here, in addition to the holiday context of the displays, assist the court's determination whether a particular display of a religious symbol, when considered in its full context, has the direct and immediate effect of advancing religion in violation of the Establishment Clause. This was the contention of respondents below and the panoply of factors enabled the Third Circuit properly to assess that contention. This Court should endorse that analysis because it will enable other courts, when similarly

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38. That sign read: "Salute to Liberty. During this holiday season, the City of Pittsburgh salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom." (JEV 41).

39. "This creche has been erected and maintained solely by the Scarsdale Creche Committee, a private organization." 739 F.2d at 720.

40. *Compare* the disclaimer in *American Jewish Congress v. City of Chicago*, *supra*, which stated "[T]his exhibit is neither sponsored nor endorsed by the Government of the City of Chicago." 827 F.2d at 120.

presented with governmental displays of religious symbols, to assess their constitutionality.

IV. THE JUXTAPOSITION OF THE CHRISTMAS TREE AND MENORAH DOES NOT UNDERCUT THE CONCLUSION THAT THE DISPLAY OF THE MENORAH ON THE STEPS OF PITTSBURGH'S CITY-COUNTY BUILDING VIOLATES THE ESTABLISHMENT CLAUSE.

Lynch's holding was premised on its finding that the holiday display in Pawtucket marked a secular celebration of a public holiday. This Court recognized that in one form or another, Christmas is celebrated everywhere, even on government property, typically in the form of a Christmas tree. In this case, Chabad begins with that assumption and advocates an argument which displays a shocking insensitivity for those Americans, like respondent Tunador, who are neither Jews nor Christians; namely, that government must erect Menorahs next to an "official" Christmas tree to counterbalance the overwhelmingly Christian message delivered by municipal displays that feature Christmas trees. (Chabad Brief at 16-17). The presence of the tree, however, does not alter the conclusion that the display of the Menorah on the steps of Pittsburgh's City-County Building cannot withstand constitutional scrutiny.

While amici do not wish to be understood as condoning the practice of placing Christmas trees on public land,[41] they acknowledge that, in analyzing seasonal displays under the Establishment Clause, courts will conclude that the tree has become a secular symbol of a secular holiday, devoid of any religious connotation. However, the Menorah in this culture is primarily viewed as a Jewish religious symbol, not the equivalent of a Christmas tree. The juxtaposition of these two symbols does not defeat the religious impact of the Menorah.

In a "nation with the soul of a church,"[42] in which religion

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41. On the contrary, amici believe that, as a matter of public policy, the practice is insensitive to non-Christians.

42. *See* S.E. Mead, *The Nation With The Soul of A Church* (1975).

is so much a part of the national culture, it is not surprising that the Establishment Clause would have substantial impact. Disentangling government and religion sometimes impacts on the surrounding culture, hurrying its secularization, though the culture is not itself subject to the Establishment Clause. However, where the culture has religious elements, government must, by virtue of the Establishment Clause, stand free of it.

Over time, some practices, religious in origin, lose their religious significance or become so integrated into the secular culture that their religious significance is obscured, or even lost. Such was the case with the Sunday blue laws. *Gallagher* v. *Crown Kosher Market*, 366 U.S. 617 (1961); *Braunfeld* v. *Brown*, 366 U.S. 599 (1961); *McGowan* v. *Maryland*, 366 U.S. 420 (1961) (collectively *Sunday Blue Law Cases*).

Without doubt, Christmas has become part of the popular culture and has lost much of its religious significance. *Lynch*, 465 U.S. at 680; J.H. Barnett, *The American Christmas: A Study in National Culture* (1954). But not *every* Christmas practice is part of the popular culture. Many are still the exclusive province of the churches. Even under the Solicitor General's seemingly limitless approval of governmental acknowledgments of the role of religion in American life (U.S. Brief at 21), it cannot seriously be contended that a municipality may sponsor a Christmas Mass. And judges, including at least one who believes that *Lynch* permits the December display of Creches in all circumstances, have had little difficulty concluding that *Lynch* does not permit the display of Crosses at Christmas to mark the holiday.[43]

The task in a case involving publicly sponsored holiday practices is to determine which religious symbols have entered the secular culture to such a degree as to be permissible for government use. In the case of non-Christian religious practices, this task is greatly eased, for such practices are unlikely to have entered the general culture. The task is harder in the case of

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43. *See ACLU* v. *City of St. Charles*, 794 F.2d 265 (7th Cir.), *cert. denied*, 479 U.S. 961 (1986); *ACLU* v. *Mississippi State General Services Admin.*, 652 F. Supp. 380 (S.D. Miss. 1987); *Libin* v. *Town of Greenwich*, 625 F. Supp. 393 (D. Conn. 1985).

Christian practices, where only case-by-case adjudication can distinguish between secularized religious practices and still sacred ones.

As occurred in the *Sunday Blue Law Cases*, *supra*, this method of inquiry is likely to tolerate practices which are popularly regarded as devoid of substantial current religious content, but which are still seen as deeply religious by minority faiths.[44] This is the case with the Christmas tree. With the exception of the unusual situation in which a tree is decorated or displayed in a fashion to suggest only a religious message, it may be placed on public land without violating the Establishment Clause. *Lynch v. Donnelly*. Unlike the Creche, whose origin is purely religious, the Christmas tree's origins lie in an ancient winter solstice festival, with little or no contemporary religious significance. Over the centuries, Christian churches repeatedly tried unsuccessfully to give the tree a religious meaning. The tree came to America with German immigrants and without religious connotations; none have been added over the years. Indeed, the tree is today *the* American symbol of the secular Christmas.[45]

By contrast, in this culture, a Menorah as displayed by Chabad is primarily a Jewish religious symbol.[46] Hence, it is not the legal equivalent of a Christmas tree.[47] The equality principle of the First Amendment, like its counterpart in the Fourteenth,

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44. A minority may even recognize that a particular practice no longer has religious significance for the majority faith, but regard it as one which marks the boundary between the two faiths. Thus, Jews can, at the same time, acknowledge that a Christmas tree is not a religious symbol for Christians, but treat it as unacceptable for display in Jewish homes.

45. *See* J.W. Golby and A.W. Purdue, *The Making of Modern Christmas* 61 (1986); P.V. Snider, *The Christmas Tree Book* 11-35 (1961); C.A. Miles, *Christmas in Ritual and Tradition: Christian and Pagan* 263-71 (1912).

46. *See* H. Dreyfuss, *Symbol Sourcebook* 139 (1972) (Menorah is symbol of Judaism).

47. If Chabad is correct that the Christmas tree is a religious symbol, then the appropriate remedy is not one compounding the constitutional felony, as Chabad would have it, but an order banning all officially sponsored religious displays or at least those which do not comport with the requirements of *Lynch*.

requires only that like, not unlike, things be treated alike.[48] There are non-religious Chanukah symbols such as a dreidel (top) or a figure of Judah Maccabee, which would raise an equality claim. The Menorah does not.

Amici respectfully submit that to treat the Menorah as a secular cultural symbol that is neutral in meaning and devoid of any inherent religious meaning does an injustice to the Menorah. Government use of religious symbols degrades those symbols and in turn degrades religion.[49] *See Engel v. Vitale*, 370 U.S. 421, 431 (1962).

Two recent polls evidence the position that the majority of Jews and their spiritual leaders prefer to retain the Menorah's religious significance unencumbered by intimate (and necessarily secularizing) contact with the state.[50] The first one demonstrated that, notwithstanding the ubiquitousness of the government Christmas tree, some 65 percent of American Jews do not wish to see Menorahs placed on government land. The other showed that 80 percent of American rabbis share that view.

If this were an access to a public forum case, as was *Widmar v. Vincent*, 454 U.S. 263 (1981), these polls would be irrelevant, since even a majority of Jews may not properly use government to censor Chabad's access to a public forum. But since this is not a public forum case, as Chabad concedes (Chabad Brief at 30), neither may it use government to compel the rest of the Jewish community to accept its idiosyncratic view that the Menorah

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48. A Creche and a Menorah are, however, comparable, since both are religious symbols. Should the Court uphold the placement of the Creche at the City Hall, *Larson v. Valente*, 456 U.S. 228 (1982), might well require that a municipality display, or permit the display of, a Menorah alongside the Creche.

49. As stated by the National Council of Churches of Christ in the USA, government display of Nativity Creches "trivializes [these] holy symbols." Brief Amici Curiae of American Jewish Committee and the National Council of Churches of Christ in the USA at III. *Lynch v. Donnelly*, 465 U.S. 668 (1984).

50. The first poll was commissioned by the American Jewish Committee and released in October 13, 1988. The second was commissioned by the Williamsburg Charter Foundation and released in February, 1988. Copies of both polls are on file with the Clerk of this Court.

must be placed on public land to counter the alleged baleful effects of the Christmas tree.

Chabad's argument is premised on the assumption that the display of the tree, without the Menorah, would be unfair to Jews. There is no general constitutional requirement, however, that a state speaking on one side of a controversial issue provide "equal time" for those taking an opposing point of view.[51] Although the City of Richmond, Virginia, may memorialize Confederate generals on one of its main thoroughfares, neither Nat Turner's nor John Brown's descendants have a constitutional right to place alongside those monuments one commemorating their respective ancestors in order to counter the symbolic impact of the publicly sponsored memorials.

The Establishment Clause does not guarantee that minority groups will feel perfectly at ease in the secular culture. Even if, for example, the government were to erect no Christmas trees, the very fact that government offices are closed on Christmas would signal to Jews that they are different.

The Establishment Clause is not alone sufficient to solve the problems confronting religious minorities. It is no substitute for the responsibility of religious groups to insure that their adherents are sufficiently educated, sufficiently strengthened, and sufficiently self-confident to withstand the siren song of the surrounding culture. They are charged with the difficult task of presenting their particularity at the same time as they participate in the larger society. Indeed, it is particularly important for religious minorities that their sacred symbols be retained as such, and not used by the culture for profane purposes, no matter how well intended.

The Menorah as displayed at Pittsburgh City Hall, like the Creche displayed at the Allegheny Courthouse, is a religious symbol. Both displays at seats of government, when considered in their full context, have the direct and immediate effect of advancing religion in violation of the Establishment Clause.

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51. *Serra v. United States General Services Admin.*, 847 F.2d 1045 (2nd Cir. 1988); *Block v. Meese*, 793 F.2d 1303, 1313 (D.C. Cir. 1986) (Scalia, J.); M. Yudoff, *When Government Speaks* 292-99 (1983).

Conclusion

For the reasons stated, the judgment of the United States Court of Appeals for the Third Circuit should be affirmed.

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APPENDIX

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Member Organizations Of The National Jewish Community Relations Advisory Council

Birmingham Jewish Community Council
Greater Phoenix Jewish Federation
Tucson Jewish Federation of Southern Arizona
Greater Long Beach & West Orange County Jewish Community Federation
Los Angeles Community Relations Committee of Jewish Federation-Council
Oakland Greater East Bay Jewish Community Relations Council
Orange County Jewish Federation
Sacramento Jewish Community Relations Council
San Diego Community Relations Committee of United Jewish Federation
San Francisco Jewish Community Relations Council
Greater San Jose Jewish Community Relations Council
Greater Bridgeport Jewish Federation
Greater Danbury Community Relations Council Jewish Committee of Jewish Federation
Eastern Connecticut Jewish Federation
Greater Hartford Community Relations Committee of Jewish Federation
New Haven Jewish Federation
Greater Norwalk Jewish Federation
Stamford United Jewish Federation
Waterbury Jewish Federation
Jewish Community Relations Council of Connecticut
Wilmington Jewish Federation of Delaware
Greater Washington Jewish Community Council
South Broward Jewish Federation
Jacksonville Jewish Federation
Greater Miami Jewish Federation
Greater Orlando Jewish Federation
Palm Beach County Jewish Federation
Pinellas County Jewish Federation

Sarasota Manatee Jewish Federation
South County Jewish Federation
Atlanta Jewish Federation
Savannah Jewish Council
Metropolitan Chicago Jewish Community Relations Council of the Jewish United Fund
Peoria Jewish Federation
Springfield Jewish Federation
Indianapolis Jewish Community Relations Council
South Bend Jewish Federation of St. Joseph Valley
Jewish Community Relations Council of Indiana
Greater Des Moines Jewish Federation
Lexington Central Kentucky Jewish Federation
Louisville Jewish Community Federation
Greater New Orleans Jewish Federation
Shreveport Jewish Federation
Portland Southern Maine Jewish Federation—Community Council
Baltimore Jewish Community Relations Council
Greater Boston Jewish Community Relations Council
Marblehead North Shore Jewish Federation
Greater New Bedford Jewish Federation
Springfield Jewish Federation
Worcester Jewish Federation
Metropolitan Detroit Jewish Community Council
Flint Jewish Federation
Minneapolis Minnesota & Dakotas Jewish Community Relations Council—Anti-Defamation League
Greater Kansas City Jewish Community Relations Bureau
St. Louis Jewish Community Relations Council
Omaha Jewish Community Relations Committee of Jewish Federation
Atlantic County Federation of Jewish Agencies
Central New Jersey Jewish Federation
Delaware Valley Jewish Federation
Metrowest United Jewish Federation
Greater Middlesex County Jewish Federation

Northern New Jersey Jewish Community Relations Council
Southern New Jersey Jewish Community Relations Council of Jewish Federation
Albuquerque Jewish Community Council
Binghamton Jewish Federation of Broome County
Greater Buffalo Jewish Federation
Elmire Community Relations Committee of Jewish Welfare Fund
Greater Kingston Jewish Federation
Northeastern New York United Jewish Federation
Rochester Jewish Federation
Syracuse Jewish Federation
Utica Jewish Federation
Akron Jewish Community Federation
Canton Jewish Community Federation
Cincinnati Jewish Community Relations Council
Cleveland Jewish Community Federation
Columbus Community Relations Committee of Jewish Federation
Greater Dayton Community Relations Council of Jewish Federation
Greater Toledo Community Relations Council of Jewish Federation
Youngstown Jewish Community Relations Council of Jewish Federation
Oklahoma City Jewish Community Council
Tulsa Jewish Federation
Portland Jewish Federation
Allentown Community Relations Committee of Jewish Federation
Erie Jewish Community Council
Greater Philadelphia Jewish Community Relations Council
Pittsburgh Community Relations Committee of United Jewish Federation
Scranton-Lackawanna Jewish Federation
Greater Wilkes Barre Jewish Federation

Providence Community Relations Council of Rhode Island Jewish Federation
Charleston Jewish Community Relations Committee
Columbia Community Relations Committee of Jewish Welfare Federation
Memphis Jewish Community Relations Council
Nashville & Middle Tennessee Jewish Federation
Austin Jewish Community Council
Greater Dallas Jewish Community Relations Council of Jewish Federation
El Paso Jewish Community Relations Committee
Fort Worth Jewish Federation
Greater Houston Jewish Federation
San Antonio Jewish Community Relations Council of Jewish Federation
Newport News — Hampton United Jewish Community Relations
Council of Jewish Federation
Richmond Jewish Community Federation
Tidewater United Jewish Federation
Greater Seattle Jewish Federation Madison Jewish Community Council
Milwaukee Jewish Council